EDITOR'S NOTE

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
Imminent Execution Scheduled
November 23, 1999

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77 pp

APPENDIX TABLE OF CONTENTS

Fourth Circuit Opinion sought to be reviewed:
Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999). 1

District Court Opinion:
Ramdass v. Angelone, 28 F.Supp. 2d. 343 (E.D. Va. 1998). 21

Opinion of Supreme Court of Virginia:
Ramdass v. Commonwealth of Virginia, 450 S.E.2d. 360 (1994). 53

United States Supreme Court Remand:
Ramdass v. Virginia, 512 U.S. 1217 (1994). 55

Opinion of Supreme Court of Virginia:
Ramdass v. Commonwealth of Virginia, 437 S.E.2d 566 (1993). 56

Order on Petition for Rehearing and Rehearing En Banc,
United States Court of Appeals for the Fourth Circuit, September 17, 1999. 65

Rule 3A: 15, Rules of the Supreme Court of Virginia. 67

Code of Virginia § 53.1-151, Eligibility for Parole. 68

South Caroline Code § 16-3-20, Punishment for Murder. 71

III.

The district court further concluded that appellant was in constructive possession of the gun and drugs when they were discovered in the course of the search of his car. We agree.

[2, 3] A person has constructive possession over contraband when he has ownership, dominion, or control over the contraband itself or over the premises or vehicle in which it was concealed. *See, e.g., United States v. Blue*, 957 F.2d 106, 107 (4th Cir.1992) (*en banc*). In this case, as the district court noted, not only did appellant own the car in which the contraband was concealed, but appellant was the only person in the car when it was stopped, the gun was under a floor mat on the driver's side, and the drugs were located in a compartment to the left of the steering wheel. When taken together, these findings amply support the district court's conclusion that appellant constructively possessed the gun and drugs found during the search.

The judgment of the district court is affirmed.

AFFIRMED

Bobby Lee RAMDASS, Petitioner–Appellee,

v.

Ronald J. ANGELONE, Director, Virginia Department of Corrections, Respondent–Appellant.

Bobby Lee Ramdass, Petitioner–Appellant,

v.

Ronald J. Angelone, Director, Virginia Department of Corrections, Respondent–Appellee.

Nos. 98–30, 98–32.

United States Court of Appeals, Fourth Circuit.

Argued May 4, 1999.

Decided Aug. 3, 1999.

Petitioner convicted of capital murder in state court sought habeas corpus relief, after exhausting state appellate and habeas procedures. The United States District Court for the Eastern District of Virginia, Raymond A. Jackson, J., 28 F.Supp.2d 343, granted writ of habeas corpus on one claim. State appealed, and petitioner cross-appealed. The Court of Appeals, Niemeyer, Circuit Judge, held that: (1) whether petitioner was parole ineligible, and thus entitled to inform jury of that status, was question of state law; (2) state court's legal determination that petitioner was eligible for parole was not reviewable by federal habeas court; (3) petitioner was not denied assistance of mental health expert; and (4) petitioner was not deprived of effective assistance of counsel.

Affirmed in part and reversed in part.

Murnaghan, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Habeas Corpus ⇐364, 366

Petitioner preserved, for habeas review, his claim that jury in capital murder trial should have been informed of petitioner's alleged parole ineligibility, by raising claim in his first direct appeal to state court, in his direct appeal on remand from the United States Supreme Court, and in his state habeas petition. 28 U.S.C.A. § 2254(b).

2. Constitutional Law ⇐268(2.1, 11)

A defendant in a capital case is entitled, under the due process clause, to inform the sentencing jury of parole ineligibility by argument or, on his request, by instruction from the court when (1) the prosecution makes the "future dangerousness" argument that the defendant will pose a threat to society in the future and (2) the only available alternative sentence to death is life imprisonment without the possibility of parole. U.S.C.A. Const. Amends. 5, 14.

3. Courts ⇐100(1)

Where Supreme Court decided *Simmons* case, holding that capital defendant may raise issue of parole eligibility at sentencing when prosecution argues "future dangerousness," before petitioner's direct appeal was final, application of *Simmons* to federal habeas petition was not barred on retroactivity grounds.

4. Habeas Corpus ⇐516.1

Parole eligibility for a state conviction is a state law question.

5. Constitutional Law ⇐270(2)

A state trial court must determine the question of whether a capital defendant is entitled to inform the jury of his alleged parole ineligibility, under due process clause, based on whether state law renders that defendant ineligible for parole. U.S.C.A. Const.Amend. 14.

6. Habeas Corpus ⇐505

Even if petitioner's due process right to inform capital jury of his alleged parole ineligibility, where prosecution argued future dangerousness, was determined by practical, rather than legal, parole ineligibility, such rule was not clearly established, as required to obtain federal habeas relief on claim that petitioner was deprived of that right because he was, as a practical matter, ineligible for parole. 28 U.S.C.A. § 2254(d)(1).

7. Habeas Corpus ⇐505

State court's legal determination that defendant was eligible for parole, and was thus not entitled to inform capital jury that he was parole ineligible, was not subject to review by federal habeas court. 28 U.S.C.A. § 2254(a).

8. Habeas Corpus ⇐505

Even if federal habeas court could review state court's legal determination that petitioner was eligible for parole, and was thus not entitled to inform capital jury that he was parole ineligible, state court's determination did not rely on improper form-over-substance interpretation of state's three-strikes statute, despite fact that petitioner would have been parole ineligible if judgment on separate conviction had been entered 19 days earlier. Va. Code 1950, § 53.1–151, subd. B1.

9. Habeas Corpus ⇐385

Petitioner did not preserve, for federal habeas review, his claim that state Supreme Court's interpretation of its parole eligibility statute was so arbitrary as to violate due process, as that court's mere finding that petitioner was parole eligible did not also implicitly encompass conclusion that parole eligibility finding comported with due process. U.S.C.A. Const. Amend. 14; Va.Code 1950, § 53.1–151, subd. B1.

10. Habeas Corpus ⇐381

The standard for state court exhaustion prior to filing a federal habeas petition is not whether a petitioner presented the identical claim in state court but rather whether he fairly presented his federal claim to the state court.

11. Habeas Corpus ⇐383

A claim is "fairly presented" to state court, and thus preserved for federal habeas review, when the petitioner presented to the state courts the substance of his federal habeas corpus claim; the ground relied upon must be presented face-up and squarely, and the federal question must be plainly defined.

See publication Words and Phrases for other judicial constructions and definitions.

12. Habeas Corpus ⇐383

Habeas petitioner preserved substance of his federal claim that he was denied a mental health expert in violation of due process, even though claim appeared in his state habeas petition under heading of ineffective assistance of counsel and subheading of failure to secure a mental health expert. U.S.C.A. Const. Amends. 6, 14.

13. Constitutional Law ⇐268.2(3)
Costs ⇐302.4

Defendant was not denied assistance of mental health expert, in violation of due process, absent showing to trial court that his mental state was at issue in his defense of the charges or that, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. U.S.C.A. Const.Amend. 14.

14. Habeas Corpus ⇐383

Petitioner failed to preserve, for habeas review, claim that state statute providing for assistance of mental health expert was arbitrarily enforced, in violation of due process, because, in his state habeas petition, petitioner stated only that his rights under the state statute had been denied, not that the denial violated his right to due process. U.S.C.A. Const.Amend. 14; Va. Code 1950, § 19.2–264.3:1.

15. Criminal Law ⇐641.13(7)

Trial counsel's alleged failure to object to appointment of particular mental health expert and seek assistance from alternative mental health expert once counsel realized that appointed expert would not be helpful was not ineffective assistance of counsel, as defendant suffered no prejudice thereby, where counsel presented others' testimony during penalty phase in attempt to establish mitigating factors that defendant claimed should have been presented by expert, and defendant could not show reasonable probability that court would have either removed expert upon objection or appointed an additional expert upon request. U.S.C.A. Const.Amend. 6.

ARGUED: Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. F. Nash Bilisoly, IV, Vandeventer Black, L.L.P., Norfolk, Virginia, for Appellee. **ON BRIEF:** Mark J. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellant. John M. Ryan, Vandeventer Black, L.L.P., Norfolk, Virginia; Michele J. Brace, Virginia Capital Representation Resource Center, Richmond, Virginia, for Appellee.

Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Judge Murnaghan wrote an opinion concurring in part and dissenting in part.

OPINION

NIEMEYER, Circuit Judge:

A Fairfax County, Virginia court convicted Bobby Lee Ramdass of capital murder and sentenced him to death for the murder of Mohammed Kayani during the robbery of the convenience store where Kayani was a clerk. On Ramdass' petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254, the district court granted the writ and ordered the state court to resentence Ramdass, concluding that the state court had denied Ramdass due process by denying him the opportunity established by *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), to tell the jury during sentencing that he was ineligible for parole. The

district court rejected the other grounds advanced by Ramdass in his petition.

Accepting the Virginia Supreme Court's state law determination that Ramdass was not, at the time of his sentencing proceedings, legally ineligible for parole, we conclude that *Simmons* was not applicable. Accordingly, we reverse the district court's order insofar as it concluded that *Simmons* required the writ to issue. Finding no error in the district court's disposition of the other issues, we affirm the remaining portion of the district court's order.

I

The facts of Kayani's murder are related by the Virginia Supreme Court as follows:

> During the night of September 1 and early morning of September 2, 1992, Ramdass and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7–Eleven store on Buelah Street in Fairfax County.
>
> Accordingly, near one o'clock on the morning of September 2, the five men entered the 7–Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7–Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.
>
> After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f head off." Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.
>
> Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.
>
> When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?"
>
> After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."
>
> Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

Ramdass v. Commonwealth ("*Ramdass I*"), 246 Va. 413, 437 S.E.2d 566, 568–69 (1993) (footnote omitted). Following indictment and a trial, a Fairfax County jury found Ramdass guilty of capital murder in the commission of armed robbery as well as illegal use of a firearm. Ramdass had earlier pled guilty to one count of robbery.

At the sentencing phase of trial, the Commonwealth of Virginia sought the death penalty, arguing that Ramdass presented "a continuing serious threat to society"—the "future dangerousness" predicate for imposition of the death penalty. *See* Va.Code Ann. § 19.2–264.2. In support of this argument, the Commonwealth presented evidence of Ramdass' history of theft-related crimes beginning at age 14 and his pattern of recidivism during periods of escape or probation. More specifically, the prosecution detailed how, within three months of his release on mandatory parole after serving four years of a seven-year sentence for robbery, Ramdass committed a series of at least six armed robberies. The first two robberies occurred on August 25, 1992, when Ramdass robbed a Pizza Hut in Fairfax County, abducting a woman and hitting a man. Four days later, he robbed a clerk at an apartment-hotel in Alexandria and struck him in the head with a gun. On August 30, 1992, he shot and robbed a cab driver. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Finally, Ramdass killed Mohammed Kayani on September 2, 1992, during the sixth robbery in this eight day spree. *See Ramdass I*, 437 S.E.2d at 574. Ramdass' counsel responded to the prosecution's argument by asserting that "Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison."

During sentencing deliberations, the jury asked: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" While recognizing that Virginia law did not permit a sentencing jury to be informed of the defendant's parole eligibility, Ramdass' counsel nevertheless maintained that "the [jurors'] question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time" and that it was necessary to inform the jury otherwise with "some kind of language that would balance out that perception." Over defense counsel's objection, the trial judge told the jurors that they "should impose such punishment as [they] feel is just under the evidence and within the instructions of the Court" and that they "are not to concern [them]selves with what may happen afterwards." The jury returned a verdict recommending death on the capital murder count, based upon Ramdass' "future dangerousness," and recommending four years imprisonment on the firearm count.

At the sentencing hearing in April 1993, Ramdass' counsel urged the court to impose a sentence of life in prison instead of death in light of Ramdass' ineligibility for parole under Virginia's three-strikes provision.[1] *See* Va.Code Ann. § 53.1–151(B1). Defense counsel proffered to the court that three jurors had told him that they would have imposed a life sentence rather than death if they had known that Ramdass would not be eligible for parole. Rejecting defense counsel's request, the court sentenced Ramdass to death.

1. Ramdass' parole eligibility at the time of the sentencing hearing was governed by Virginia's three-strikes statute, which provides that an individual is *ineligible* for parole if he has been "convicted of three separate felony offenses" of murder, rape, or armed robbery, which "were not part of a common act, transaction or scheme." Va.Code Ann. § 53.1–151(B1). At the time the jury was deliberating his sentence in this case, Ramdass had already been sentenced (the week before) to 76 years imprisonment in connection with the Pizza Hut armed robbery. In addition, about three weeks earlier, on January 7, 1993, a jury had returned a verdict finding Ramdass guilty in the Domino's Pizza armed robbery, for which it recommended an 18–year sentence. The court, however, had not yet entered judgment in that case. It did so nearly three weeks *after* the jury in this case concluded its sentencing deliberations.

On direct appeal to the Virginia Supreme Court, Ramdass argued, *inter alia*, that his death sentence violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial judge prevented him from telling the jury that he was parole ineligible, a potentially mitigating factor. Rejecting that argument, the Virginia Supreme Court stated that Ramdass had advanced "no persuasive reason" to modify prior Virginia precedent holding that "a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Ramdass I*, 437 S.E.2d at 573 (citing *Wright v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379, 392 (1993)).

From that court's decision, Ramdass filed a petition for writ of certiorari with the United States Supreme Court. While that petition was pending, the United States Supreme Court decided *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), holding that when a prosecutor argues future dangerousness to a capital sentencing jury, a defendant who is parole ineligible has a due process right to respond to that argument by informing the jury, through argument or instruction, of his ineligibility for parole. After deciding *Simmons*, the Supreme Court granted Ramdass' petition for certiorari and remanded his case to the Virginia Supreme Court for reconsideration in light of *Simmons*. *See Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

On remand, Ramdass asserted that because he was ineligible for parole under Virginia's three-strikes statute, *Simmons* applied to his case and required that he be allowed to "meet the state's case against him" by informing the jury of his parole ineligibility. The Virginia Supreme Court, however, reaffirmed Ramdass' death sentence, concluding that the holding of *Simmons* was not implicated. Noting that *Simmons* applies "only if Ramdass was ineligible for parole when the jury was considering his sentence," the Virginia Supreme Court determined that Ramdass was "not ineligible for parole since he had only two separate felony offenses within the meaning of [the three-strikes provision]." *Ramdass v. Commonwealth* ("*Ramdass II*"), 248 Va. 518, 450 S.E.2d 360, 361 (1994) (internal quotation marks omitted). While recognizing the Pizza Hut conviction and the Kayani murder conviction as predicate offenses under the three-strikes statute, the court rejected Ramdass' argument that the January 7, 1993 jury verdict of guilty in the Domino's Pizza robbery was also a predicate conviction because "[j]udgment had not been entered on that verdict." *Id.* Accordingly, the court stated, "it cannot be considered as a conviction" under the three-strikes provision. *Id.* (citing *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707, 709 (1922)).

Pursuing state post-conviction relief, Ramdass again asserted in his state habeas petition that *Simmons* required that the jury be accurately informed as to his parole eligibility status, although he did not specifically challenge the Virginia Supreme Court's determination in *Ramdass II* that under Virginia law he was not ineligible for parole. Ramdass also claimed that his trial counsel were constitutionally ineffective for, *inter alia*, failing to investigate and to object to the appointment of Dr. Stanton Samenow as his mental health expert because Dr. Samenow was "notoriously pro–prosecution" and refused to work with the defense. In arguing the ineffective assistance of counsel, Ramdass stated also that he was denied the reasonable assistance of a mental health expert at trial, in violation of both *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (holding that in limited circumstances, a criminal defendant has a Fourteenth Amendment right to access to a competent psychiatrist) and Virginia Code § 19.2–264.3:1 (entitling indigent capital defendants to the assistance of a mental health expert). The Virginia Supreme Court dismissed the petition. It ruled that

Ramdass' *Simmons* claim was barred from review under the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970) (holding that an issue previously decided against the petitioner on direct appeal may not again be considered on post-conviction review), and it summarily rejected Ramdass' ineffective assistance of counsel claim.

Seeking habeas relief in the federal courts, Ramdass filed this petition in February 1997, alleging, among other things, unconstitutional error in the trial court's failure to allow the jury to consider his alleged parole ineligibility. He also claimed that trial counsel were constitutionally ineffective for failing to investigate the views and reputation of Dr. Samenow, for failing to object to his appointment, and for failing to seek alternative mental health testimony. Finally, he alleged that his Fourteenth Amendment right to the assistance of a mental health expert had been violated, either under *Ake* or by deprivation of a state-created right to such assistance provided in Va.Code Ann. § 19.2–264.3:1. The district court granted Ramdass a writ of habeas corpus based on the *Simmons* claim, dismissed the remaining claims, and ordered the state trial court to resentence him. *See Ramdass v. Angelone*, 28 F.Supp.2d 343, 356–74 (E.D.Va.1998). From the district court's order, the Commonwealth of Virginia appealed to challenge the *Simmons* ruling, and Ramdass cross-appealed to preserve his claim on various other grounds rejected by the district court.

II

In its appeal, the Commonwealth of Virginia raises two issues: (1) that the *Simmons* claim was defaulted because it was not properly raised in state court, and (2) that Ramdass is, in any case, not entitled to relief under *Simmons* because, had he been sentenced to life imprisonment, he would not have been parole ineligible under Virginia law.

[1] The Commonwealth's first point—that Ramdass failed to preserve his *Simmons* claim by raising it in state court as required by 28 U.S.C. § 2254(b) (barring federal courts from entertaining habeas petitions from individuals who have not exhausted their state court remedies)—does not merit an extended discussion. Prior to filing his federal habeas petition, Ramdass raised his core *Simmons* claim—that due process entitled him to inform the jury that he was ineligible for parole—to the Virginia Supreme Court on at least three separate occasions: in his first direct appeal, in his direct appeal on remand from the United States Supreme Court, and in his state habeas petition. Indeed, the most compelling evidence that Ramdass did not default his *Simmons* claim is the fact that the Virginia Supreme Court disposed of that claim by declaring it barred from review on state habeas by the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), which proscribes the relitigation of claims that have *already been adjudicated on the merits* in state court on direct appeal.

While it is true, as the Commonwealth points out, that Ramdass did not specifically contest the parole eligibility determination in his state habeas petition, he did assert the broader, more basic claim, which he had made all along, that the trial court's refusal to give the jury that information on his request violated his constitutional right to due process. We believe that the Commonwealth's characterization of Ramdass' *Simmons* claim for this purpose is unduly narrow. Accordingly, we conclude that the district court did not err in finding that the *Simmons* claim was not defaulted. We now turn to the merits.[2]

2. The Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), establishing the applicable standard of review, provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court

A

Understanding first the precise rule in *Simmons* will aid our analysis of Ramdass' claims. In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the prosecutor had argued to the jury during the penalty phase of trial that the death sentence was appropriate because Simmons, who had assaulted and killed several elderly women, was a future danger to society. To rebut this argument, Simmons contended that because he was only a threat to elderly women, none of whom he would ever encounter in prison, he did not pose such a danger. He proffered evidence that he was legally ineligible for parole and requested an instruction to the jury that if sentenced to life imprisonment, he would remain imprisoned "for the balance of his natural life." *Id.* at 160, 114 S.Ct. 2187. The trial court denied Simmons' request to inform the jury, either by argument or instruction, of his ineligibility for parole under South Carolina law. The United States Supreme Court ruled that this denied Simmons due process as guaranteed by the Fourteenth Amendment. *Id.* at 156, 171, 114 S.Ct. 2187 (Blackmun, J., plurality opinion); *id.* at 178, 114 S.Ct. 2187 (O'Connor, J., concurring). We recognize Justice O'Connor's concurrence as the controlling opinion in *Simmons* because it represents the narrowest grounds upon which a majority of the Court agreed. *See Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), *cert. denied*, — U.S. —, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Townes v. Murray*, 68 F.3d 840, 849 (4th Cir.1995); *see also O'Dell v. Netherland*, 521 U.S. 151, 158, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

Writing for the plurality, Justice Blackmun held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156, 114 S.Ct. 2187. When the jury lacks such information, the plurality noted, there is a real danger that the state will "succeed[ ] in securing a death sentence on the ground, at least in part, of ... future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Id.* at 162, 114 S.Ct. 2187.

In her concurrence, Justice O'Connor recognized that when a state prosecutor argues future dangerousness to the jury, the defendant's only opportunity to rebut that argument will often be by telling the jury that "he will never be released from prison." *Id.* at 177, 114 S.Ct. 2187. Justice O'Connor went on to conclude that

> in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id.

[2] Accordingly, the grounds on which both the plurality and Justice O'Connor agree are summarized in *Townes v. Murray*, 68 F.3d 840, 850 (4th Cir.1995):

> *Simmons* does not hold, as the plurality opinion at one point put it, that "due process requires that the sentencing jury be informed that the defendant is parole ineligible," *id.* at [156, 114 S.Ct. 2187] (plurality opinion). It only holds more narrowly that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible." *Id.* at [177, 114 S.Ct. 2187] (O'Connor, J.).... Put in terms familiar from philosophical and jurisprudential debates over the proper meaning of "equality" and "equal protection," the defendant's right, under *Simmons*, is one of opportunity, not of result.

In short, a defendant in a capital case is constitutionally entitled, under *Simmons*, to inform the sentencing jury of parole ineligibility by argument or, on his request, by instruction from the court when (1) the prosecution makes the "future dangerousness" argument that the defendant will pose a threat to society in the future and (2) the only available alternative sentence to death is life imprisonment without the possibility of parole.

[3] It is undisputed in this case that Ramdass meets the first requirement. The prosecutor at Ramdass' sentencing proceeding argued that the death penalty was necessary solely because Ramdass was a future danger to society. Whether Ramdass meets the second requirement is the principal source of dispute in the appeal before us.[3] Resolution of this issue depends on how *Simmons* defines parole ineligibility and whether, under the standards for making that determination, Ramdass was ineligible for parole at the time of the penalty phase of trial.

B

In *Ramdass II*, the Virginia Supreme Court held that *Simmons* did not apply to Ramdass' case because *Simmons* required *legal* ineligibility for parole and Ramdass was not ineligible for parole under Virginia law. The Court concluded that if sentenced to life imprisonment on the Kayani murder, Ramdass would not have been "convicted of three separate felony offenses" of murder, rape, or armed robbery as required for parole ineligibility under Virginia's three-strikes statute. Va.Code Ann. § 53.1-151(B1). According to the court, Ramdass' qualifying convictions at the time were (1) the Pizza Hut armed robbery conviction, upon which judgment had been entered, and (2) the Kayani murder conviction. The court acknowledged that a jury had also returned a verdict finding Ramdass guilty of armed robbery in the Domino's Pizza incident. But, relying on *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922), which held that conviction does not occur until judgment is entered, the court concluded that the Domino's Pizza robbery could not be counted as the third strike under the Virginia statute because the court had not entered judgment on that guilty verdict at the time that the jury in this case was deliberating Ramdass' sentence. *See Ramdass II*, 450 S.E.2d at 361.

proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

3. It is undisputed that the Supreme Court decided *Simmons before* Ramdass' direct appeal was final. *See Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994) (granting Ramdass' petition for certiorari on direct appeal and remanding to the Virginia Supreme Court for reconsideration in light of *Simmons*); *cf. O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (declaring that *Simmons* announced a "new rule" under *Teague* for all *already final* convictions). Accordingly, the anti-retroactivity component of § 2254(d) would not bar application of *Simmons* to Ramdass' habeas petition on retroactivity grounds if *Simmons* is otherwise applicable as a matter of substantive law.

Ramdass contends that the Virginia Supreme Court misconstrued *Simmons* as requiring a *state law* determination of parole ineligibility rather than "the functional and common-sense [im]possibility of parole" as the trigger for the right to inform the jury of parole ineligibility. Moreover, even if state law governs the parole ineligibility determination for purposes of applying *Simmons*, Ramdass, in substance, accuses the Virginia Supreme Court of attempting to avoid the application of *Simmons* by adopting a novel and highly technical definition of "convicted" in the three-strikes provision. Further, Ramdass maintains that even if a conviction requires the entry of judgment, as *Ramdass II* held, the Domino's Pizza guilty verdict should count as a conviction because the entry of judgment was nondiscretionary, purely ministerial, and legally insignificant. In short, Ramdass argues for a pragmatic, functional, nonlegalistic concept of when a defendant is ineligible for parole.

[4, 5] Because Ramdass advances an erroneous interpretation of *Simmons*, we must begin by turning to *Simmons* itself. *Simmons* grants capital defendants a due process right in state trials to advise a jury of parole ineligibility only when the only alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole. That condition cannot be a general question of practicality determined by a federal habeas court, as Ramdass argues. Parole eligibility is a state law question. Under *Simmons*, only those capital defendants who are parole ineligible *under state law* at sentencing are constitutionally entitled to inform the jury that they will be ineligible for parole if sentenced to life imprisonment. In other words, a trial court must determine the question of whether *Simmons* applies to a particular defendant based on whether *state law* renders that defendant ineligible for parole. *See Simmons*, 512 U.S. at 156, 114 S.Ct. 2187 (Blackmun, J., plurality opinion) (limiting the holding to situations where "state law prohibits the defendant's release on parole"); *id.* at 176, 114 S.Ct. 2187 (O'Connor, J., concurring) (citing South Carolina statutes to demonstrate that for Simmons "the only available alternative sentence to death ... was life imprisonment without the possibility of parole").

When Ramdass argues that *Simmons'* applicability is not conditioned on "a state's determination of 'parole ineligibility' at the moment of capital sentencing" but rather on a nonlegalistic "common-sense [im]possibility of parole," he advances a new interpretation of *Simmons* that is simply incompatible with the logic of *Simmons* itself. In relying on Justice O'Connor's statement that *Simmons* applies in "cases in which the only available alternative sentence to death ... is life imprisonment without possibility of parole," *id.* at 177, 114 S.Ct. 2187, to argue that a federal, functional standard applies to parole ineligibility determinations, Ramdass ignores the *Simmons* plurality's repeated reference to state law as the determining factor for whether or not a defendant is ineligible for parole. *See, e.g., id.* at 156, 114 S.Ct. 2187 ("We hold that where the defendant's future dangerousness is at issue, and *state law* prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible" (emphasis added)); *id.* at 165, 114 S.Ct. 2187 (observing that the defendant's ability to use parole ineligibility to rebut a future dangerousness argument depends "on the fact that he was *legally* ineligible for parole" (emphasis added)); *id.* at 165 n. 5, 114 S.Ct. 2187 ("The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole *under state law*" (emphasis added)). Moreover, his reliance on Justice O'Connor's language is also misplaced. Ramdass' interpretation not only reads too much into Justice O'Connor's phraseology, but it also

takes the phrase out of context. Nothing in Justice O'Connor's concurrence indicates that she disagreed with the plurality and believed that the parole eligibility determination was governed by anything other than state law. On the contrary, she cited state law to show that Simmons himself was ineligible for parole, *see id.* at 176, 114 S.Ct. 2187, and she concluded that Simmons was entitled to communicate his parole ineligibility to the jury because "the only alternative sentence to death *under state law* was life imprisonment without possibility of parole," *id.* at 178, 114 S.Ct. 2187 (emphasis added). *See also id.* at 176, 114 S.Ct. 2187 ("In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact").

In addition, Ramdass' argument for equating legal parole ineligibility with a common-sense impossibility of parole is at odds with case law from this circuit. Under Ramdass' theory, defendants who are, as a practical matter, unlikely to be paroled—perhaps because a state only rarely grants parole or because the defendant would be over a hundred years old when finally legally eligible—would be entitled to a *Simmons* instruction. Yet, we have consistently refused to apply *Simmons* to cases in which the defendants were not legally ineligible for parole at the time of sentencing. *See, e.g., Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.1999) (refusing to extend *Simmons* to apply to a defendant who would not become eligible for parole for twenty-five years, under state law); *Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998) (holding that "[s]ince Keel would have been eligible for parole had he not been sentenced to death, [citing state law], he is not entitled to any relief under our current interpretation of *Simmons*"), *cert. denied*, — U.S. ——, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Fitzgerald v. Greene*, 150 F.3d 357, 367 (4th Cir.) (declining to apply *Simmons* after Virginia Supreme Court determined defendant was not ineligible for parole under the three strikes statute because his convictions arose out of the same transaction), *cert. denied*, — U.S. ——, 119 S.Ct. 389, 142 L.Ed.2d 321 (1998).

Finally, as a matter of simple logic, the *fact* that a defendant will have no possibility of parole if given a life sentence can only stem from the *legal conclusion* that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

[6] Even were we persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that it was not "clearly established" as required by 28 U.S.C. § 2254(d)(1). *Cf. Keel*, 162 F.3d at 269. This statutory provision, which requires that the state court decision at issue be inconsistent with "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), "imports an anti-retroactivity principle into federal *habeas* law." *Green v. French*, 143 F.3d 865, 873 (4th Cir.1998). It resembles, but does not simply codify, the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). In fact, we have observed that the standard of § 2254(d)(1) is "even more stringent" than *Teague*. *Weeks v. Angelone*, 176 F.3d 249, 266 n. 9 (4th Cir.1999); *see also Gosier v. Welborn*, 175 F.3d 504, 510 (7th Cir.1999) (noting that § 2254(d)(1) "closes the escape hatches in *Teague*").[4] Thus, either under *Teague* or under § 2254(d)(1),

4. In fact, § 2254(d)(1) can be seen as stricter in that it does not recognize *Teague*'s two traditional exceptions which permit retroactive application of new rules which either "place[ ] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or are "watershed rules of criminal procedure." *See Green*, 143 F.3d at 873 (quoting *Teague*, 489 U.S. at 311–12, 109 S.Ct. 1060).

Ramdass' argument for an extension of *Simmons* would fail.

C

[7] Having determined that *Simmons* applies only to a capital defendant who, under state law, is legally ineligible for parole at the time of sentencing, we turn to the question of whether Ramdass meets this threshold requirement. The Virginia Supreme Court held that, under the three-strikes statute, he did not. *See Ramdass II*, 450 S.E.2d at 361. The district court held that the state court's conclusion was an unreasonable determination of fact. *See Ramdass v. Angelone*, 28 F.Supp.2d at 365.

As an initial matter, we clarify that the parole eligibility determination is a question of law, not fact, as the Virginia Supreme Court has recognized. *See Fitzgerald*, 150 F.3d at 367 (citing *Fitzgerald v. Commonwealth*, 249 Va. 299, 455 S.E.2d 506, 510 (1995)). Accordingly, to the extent that the district court's decision to grant the writ rested on the unreasonable-determination-of-fact rationale, it cannot stand.

More significantly, parole eligibility is a question of *state* law and therefore is not cognizable on federal habeas review. The AEDPA provides explicitly that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Because the definition of what constitutes a conviction in Virginia's three-strikes statute and the application of that state law definition to the facts of Ramdass' case are purely questions of state law, we have no power to revisit these questions on federal habeas review.

[8] Even if we were not so constrained, however, we would be unpersuaded by Ramdass' argument that the Virginia Supreme Court adopted an artful, form-over-substance interpretation of the three-strikes statute to thwart his *Simmons* claim. At most, Ramdass can complain about the effect of the random timing of his trials. If judgment had been entered on the Domino's Pizza robbery verdict 19 days earlier, then Ramdass would have been ineligible for parole under the three-strikes statute and accordingly entitled to inform the jury of that fact. However, given that Ramdass committed the Pizza Hut robbery, the Domino's Pizza robbery, the Kayani murder and robbery, and several other potentially qualifying offenses within several days of each other, the random order in which he was tried for these various offenses was entirely foreseeable, dictated only by the docket of the relevant county court. In fact, it is equally possible that Ramdass could have been tried on the most serious charge—the Kayani murder—first, in which case he would have had *only one* qualifying conviction at the time of sentencing and, thus, would be an additional conviction short of making a valid *Simmons* claim.

Second, Ramdass characterizes the Virginia Supreme Court's reliance on *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922) (discussing the meaning of the term "conviction" in the context of a statute removing public officials from office upon conviction of crimes of moral turpitude), as a judicial version of grasping at straws. Yet, sound reasoning supports *Smith's* holding that conviction requires an entry of judgment, rather than simply a jury verdict. *Cf.* Fed.R.Crim.P. 32(d)(1) (requiring an entry of judgment signed by the judge). Even though *Smith's* factual predicate is wholly unrelated to parole eligibility, the age-old rationale underlying its definition of conviction is designed to protect defendants. Requiring the entry of judgment—even if it appears to be only a formal step of the process—in contexts in which additional negative consequences are to be imposed based on the conviction, provides an additional layer of procedural

protection against unfairness or corruption.

Third, Ramdass attempts to portray the *Smith* decision as an irrelevant relic. While the Virginia Supreme Court had not cited this case in a published opinion since the 1920s, the intermediate appellate court has observed that "Virginia courts have defined the word 'convicted' in accordance with *Smith*, but only in the context of a defendant who has been confronted with some type of forfeiture." *Fields v. Commonwealth*, 5 Va.App. 229, 361 S.E.2d 359, 362 (1987) (purporting to limit *Smith* to its facts). As a type of forfeiture, parole ineligibility fits neatly within the narrow circumstances in which the *Smith* definition of conviction is appropriate, or even necessary. Upon amassing a given number of convictions for certain crimes, a defendant forfeits his right to be considered for parole under the standard operation of the parole system. This is precisely the kind of serious deprivation that should not occur without the solemn imprimatur of the court's entry of judgment on the decision of the jury. Finally, the fact that the Virginia Supreme Court has remanded for re-sentencing upon finding a *Simmons* violation in another case defeats the implication that the Virginia Supreme Court is somehow hostile to enforcing the *Simmons* right. *See Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

We have included this discussion only in an effort to dispel Ramdass' insinuation that the Virginia Supreme Court acted craftily in denying his *Simmons* claim. In the end, however, we reiterate that this dispute about the meaning of the Virginia three-strikes statute is wholly a question of state law that cannot provide the basis for a federal court to grant the writ of habeas corpus. *See* 28 U.S.C. § 2254(a).

III

On his cross-appeal, Ramdass contends that the district court erred in dismissing, either as defaulted or meritless, the following four other claims in support of his habeas petition: (1) the Virginia Supreme Court's determination that he was eligible for parole as of the time of sentencing under Virginia law was so arbitrary as to violate due process; (2) the denial of access to assistance from a mental health expert violated his right to due process; (3) the ineffective assistance of counsel denied him the constitutional right to counsel; and (4) the denial of funds for expert assistance and an evidentiary hearing violated his right to due process. We address these claims in order.

A

[9] First, Ramdass claims that the Virginia Supreme Court's interpretation of the three-strikes provision was so inconsistent with Virginia precedent and so arbitrary that it violated due process. In response to the Commonwealth's contention that this claim was defaulted by failure to raise it in state court, he argues that it could not have been defaulted because the Virginia Supreme Court in fact addressed it simply by concluding that he was parole eligible under Virginia law. This argument, however, proves too much. Carried to its logical conclusion, Ramdass' argument would mean that every judicial ruling carries with it an implicit, due process rubber-stamp. There is no evidence that the Virginia Supreme Court's parole eligibility determination silently encompassed an additional conclusion that the parole eligibility finding itself comported with due process. Because, as Ramdass concedes, ineffective assistance of state habeas counsel will not show cause for his default, *see Mackall v. Angelone*, 131 F.3d 442, 446–49 (4th Cir.1997), we have no power to reach the merits of this independent due process claim on federal habeas. *See* 28 U.S.C. § 2254(b)(1)(A). In any event, we would reject the claim on the merits for the reasons given in our discussion in Part II(C), above.

B

Ramdass next challenges the district court's rejection of his claims that he was

illegally denied the assistance of a mental health expert based on two, separate theories: (1) the due process right to access to a mental health expert under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and (2) the due process right to non-arbitrary enforcement of Virginia Code § 19.2–264.3:1, which grants capital defendants the assistance of a mental health expert. Although the district court did not distinguish between these two arguments, holding that they were defaulted, we conclude (1) that the *Ake* claim was preserved but that the Virginia Supreme Court did not unreasonably apply clearly established federal law in dismissing it, and (2) that the claim based on the arbitrary enforcement of state law was defaulted.

[10, 11] The standard for state court exhaustion prior to filing a federal habeas petition is not, as the Commonwealth suggests, whether a petitioner presented the "identical" claim in state court but rather whether he "fairly presented" his federal claim to the state court. "A claim is fairly presented when the petitioner presented to the state courts the *substance* of his federal habeas corpus claim. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997) (emphasis added and internal quotation marks and citations omitted).

[12] Under this standard, Ramdass did include in his state habeas petition at least the "substance" of his federal claim that he was denied a mental health expert in violation of due process under *Ake*. Even though the claim appeared under the heading of ineffective assistance of counsel and the sub-heading of failure to secure a mental health expert, Ramdass nonetheless grounded his claim on the seminal Supreme Court case, *Ake*. He summarized the holding of *Ake* and alleged facts in support of his claim that Dr. Samenow was pro-prosecution and refused to assist the defense by identifying any mitigating factors for the sentencing phase. Even so, the Virginia Supreme Court dismissed this claim, finding that it had no merit. In doing so, the Virginia Supreme Court did not unreasonably apply clearly established federal law. *See* 28 U.S.C. § 2254(d).

[13] *Ake* provides a right to assistance of a mental health expert only if a defendant made a showing to the trial court that his mental state was at issue in his defense of the charges or if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. *See Ake*, 470 U.S. at 82–83, 105 S.Ct. 1087 (noting that the need for the assistance of a psychiatrist is "readily apparent" either when "the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense" or "when *the State presents psychiatric evidence* of the [capital] defendant's future dangerousness" during the penalty phase (emphasis added)). Neither condition was met here.

[14] The due process claim for the arbitrary enforcement of a state statute was defaulted because, in his state habeas petition, Ramdass stated only that his rights under the state statute had been denied. This is no more than a state law question. Ramdass did not make the further argument, necessary to make the claim cognizable on federal habeas review, that this denial constituted a violation of his right to due process under the Fourteenth Amendment. *See* 28 U.S.C. § 2254(a).

C

[15] In support of his ineffective assistance of counsel claim, Ramdass argues that his trial counsel were deficient in failing to object to Dr. Samenow's appointment and in failing to seek assistance from an alternative mental health expert once they realized that Dr. Samenow would not be helpful. We conclude that the Virginia Supreme Court did not unreasonably apply clearly established federal law in dismissing this claim for lack of merit. *See* 28 U.S.C. § 2254(d).

To prevail on his ineffective assistance of counsel claim, Ramdass must meet two well-established requirements. First, he "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This is a difficult showing to make because in assessing the reasonableness of counsel's course of action, "[o]ur review ... is highly deferential" to counsel. *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir.1998) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Second, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The district court, assuming *arguendo* that Ramdass could satisfy the deficiency prong of *Strickland*, ruled that Ramdass's ineffective assistance claim failed because he could show no prejudice. *See Ramdass*, 28 F.Supp.2d at 370. We agree.

Instead of presenting testimony from Dr. Samenow, who had failed to identify any mitigating factors in his report on Ramdass, Ramdass' trial counsel presented testimony from Ramdass, his brother, his mother, and a probation officer during the penalty phase in an attempt to establish mitigating factors. Because the jury was aware of the dysfunctional circumstances of Ramdass' childhood, Ramdass cannot now show a reasonable probability that psychiatric testimony as to the same circumstances would produce a different result. Moreover, neither *Ake*, 470 U.S. at 83, 105 S.Ct. 1087, nor Virginia Code § 19.2–264.3:1(A) creates a right to a particular expert. Accordingly, Ramdass cannot show a reasonable probability, as required by *Strickland*, that the Virginia Supreme Court would have either removed Dr. Samenow upon objection or appointed an additional expert upon request.

D

On Ramdass' final point, we conclude that, because Ramdass failed to make out a prima facie case as to his mental health expert and ineffective assistance claims, the district court did not err in denying Ramdass funds for expert assistance or an evidentiary hearing.

IV

In sum, we reverse the district court's decision to grant Bobby Lee Ramdass' petition for a writ of habeas corpus based upon a *Simmons* violation. Because *Simmons* is limited to situations where state law renders the defendant legally, not merely practically, ineligible for parole, we conclude that the Virginia Supreme Court did not unreasonably apply clearly established federal law when it ruled that *Simmons* did not apply to Ramdass' case because Ramdass was not ineligible for parole under Virginia law. In addition, we affirm the district court's opinion as to the remaining issues raised by Ramdass on cross-appeal. The judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's handling of most of the issues raised by Ramdass.[1] I respectfully dissent, however, from the majority's treatment of Ramdass' *Simmons* claim. Because it seems evident

1. I note that I concur only in the judgment on the *Ake* claim. *Ake* provides that under certain circumstances "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Ramdass presented ample evidence to show that Dr. Stanton Samenow's professed and public views make him incompetent to aid a defendant in finding and presenting mitigating factors at a defendant's sentencing phase, and that Dr. Samenow did not conduct an appropriate examination. Dr. Samenow has pub-

that Ramdass should be able to inform the jury, by argument or court instruction, of his non-eligibility for parole if sentenced for life imprisonment, I would affirm the district court on the *Simmons* claim so that the sentencing jury could be accurately informed that Ramdass would be parole ineligible.

I.

A clear statement of the factual context of this case is useful to gain an understanding of the arbitrariness of the result reached by the majority.

The jury found Ramdass guilty of the Kayani murder on January 28, 1993. His sentencing hearing began the next day. At that hearing, the prosecution presented as evidence of Ramdass' future dangerousness the fact that he had been found guilty of the Pizza Hut robbery, *see infra*, and the Domino's Pizza robbery, *see infra*. The Commonwealth also emphasized that previously Ramdass had committed crimes

licly stated that criminals are a "different breed of person," (J.A. at 347), who seek to manipulate the system for their own ends. He has abandoned sociologic, psychologic, and mental illness explanations for criminal behavior and holds the view that "[m]ost diagnoses of mental illness [in criminals] resulted from the criminal's fabrications." (J.A. at 348.) Dr. Samenow's published works state that circumstances have nothing to do with criminal violations and that "providing the criminal with an opportunity to present excuses deferred him and us further and further from change." (J.A. at 348.) According to a report submitted to the district court by Dr. Reuben Koller, Dr. Samenow's views obviate his ability to evaluate mitigating factors relating to the history or character of a criminal defendant "because he is of the opinion that no mitigating factors can exist." (J.A. at 474.) Even if Dr. Samenow were to abandon his public beliefs and identify mitigating factors, his testimony would be subject to damaging impeachment on cross-examination from his own publicly expressed views. In fact, the record shows that just that happened at another capital sentencing trial. Further, Dr. Koller opined that Dr. Samenow's examination of Ramdass was "incomplete, deficient and inadequate according to conventional psychological standards." (*Id.*) Dr. Koller's preliminary evaluation of the records available to Dr. Samenow indicated seven specific factors ignored by Dr. Samenow which could be considered significant factors in mitigation. It is also worth noting that Dr. Samenow has been at the center of at least two other constitutional challenges. *See Swann v. Taylor*, 173 F.3d 425, 1999 WL 92435, at *6–*9 (4th Cir.1999) (unpublished table disposition) (claiming *Ake* violation); *Wright v. Angelone*, 151 F.3d 151, 161 (4th Cir.1998) (claiming ineffective assistance of counsel for using Dr. Samenow).

We have suggested that *Ake* requires only an expert and an examination, *see Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998), not a competent expert and an appropriate examination, *but see id.* at 409 (Michael, J., concurring) (noting that the *Wilson* majority did not squarely reject the right to an appropriate examination). I agree that *Ake* does not require "effective assistance of a psychiatric expert." *See, e.g., Pruett v. Thompson*, 996 F.2d 1560, 1573 n. 12 (4th Cir.1993). In my view, though, the Supreme Court requires more than just a warm body with a prefix attached to his name; *Ake* provides a right to a "competent expert" and an "appropriate examination." *Ake*, 470 U.S. at 83, 105 S.Ct. 1087. (I note that competence and appropriateness, based on objective professional criteria, are entirely different than effectiveness).

Ultimately, however, Ramdass' *Ake* claim must fail. On direct appeal I would follow the Tenth Circuit and hold that *Ake* applies when the state presents any evidence on future dangerousness and the indigent defendant establishes the likelihood his mental condition is a significant mitigating factor. *See Castro v. Oklahoma*, 71 F.3d 1502, 1513 (10th Cir.1995); *Liles v. Saffle*, 945 F.2d 333, 340–41 (10th Cir.1991). *Compare Tuggle v. Netherland*, 79 F.3d 1386, 1387–88 (4th Cir.1996) (describing the *Ake* right as arising when the prosecution first presents psychiatric testimony), *with Swann*, 173 F.3d 425, 1999 WL 92435, at *2 (stating *Ake* applies "when a capital defendant's future dangerousness is to be a significant factor at the penalty phase of the trial"). Constrained by the Anti-Terrorism and Effective Death Penalty Act of 1996 amendments to 28 U.S.C.A. § 2254(d)(1) (West Supp.1999), however, I believe that *Ake*'s application when the prosecution has not presented its own psychiatric evidence on future dangerousness is not clearly established by the Supreme Court. *Cf. Rogers v. Gibson*, 173 F.3d 1278, 1285 n. 5 (10th Cir. 1999) (stating that it is doubtful that applying *Ake* when state has not presented psychiatric evidence of future dangerousness is clearly established by the Supreme Court).

while released on "mandatory" parole. While deliberating Ramdass' sentence, the jury asked the judge, "if the Defendant is given life is there a *possibility* of parole at some point before his natural death?" (emphasis added). Rather than answering that question, the judge told the jury that they were "not to concern [themselves] with what may happen" after they impose his sentence. On January 30, 1993, the jury imposed a sentence of death.

On appeal, the Supreme Court ordered the Virginia Supreme Court to reconsider Ramdass' case in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). *Simmons* involved facts almost identical to those at bar. In *Simmons*, a defendant was made parole ineligible by a conviction for capital murder. At the sentencing phase for that crime, the defendant requested that the jury be instructed that a life sentence would not carry with it the possibility of parole. To bolster his position, the defendant cited, *inter alia*, a study indicating that more than 75 percent of those surveyed in South Carolina considered the amount of time a defendant would actually have to spend in prison to be an "extremely important" or "very important" factor in choosing between life and death. *Simmons*, 512 U.S. at 159, 114 S.Ct. 2187. As in the case at bar, during deliberations, the jury asked the judge a single question: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.* at 160, 114 S.Ct. 2187. The trial judge gave a vague answer and instructed the jury not to consider parole in reaching its verdict. *Id.* Within minutes, the jury returned a sentence of death.

On remand in the case at bar, the Virginia Supreme Court held that *Simmons* was inapplicable because under Virginia law, Ramdass was not technically parole ineligible at the time the jury was deliberating his capital sentence. Under Virginia law, a felon is parole ineligible if he has been "convicted" of three offenses of murder, rape, or robbery with a deadly weapon (a "predicate conviction"); when multiple predicate convictions are part of a common act, transaction, or scheme, they are counted as only one predicate conviction. *See* Va.Code Ann. § 53.1–151(B1) (Michie 1998) (the "three strikes law").

At the time the capital jury was considering his sentence, Ramdass had been found guilty of five robberies and one murder.[2] One of the robberies involved no deadly weapon and therefore was not a predicate conviction. Two of the other robberies were part of the same transaction. On December 15, 1992, a jury had found Ramdass guilty of two counts of robbery and one count of using a firearm in the commission of a robbery (the "Pizza Hut robbery"). Judgment and sentence for this crime was officially imposed on January 22, 1993. At the time that Ramdass was sentenced on the Kayani murder, this conviction was still subject to a motion to set aside the verdict for trial error or insufficiency of the evidence. *See* Va. Sup. Ct. R. 3A:15(b) (Michie 1998). It was also subject to an appeal. *See* Va.Code Ann. § 17–116.05:3 (Michie 1996). The Virginia Supreme Court counted the Pizza Hut robbery as only one predicate conviction.

The final two armed robberies were also part of one transaction. On January 7, 1993, in a separate proceeding, a jury found Ramdass guilty of two counts of robbery and one count of using a firearm in the commission of a robbery (the "Domino's Pizza robbery"). Judgment and sentence on this crime was not officially imposed until February 18, 1993. The Virginia Supreme Court reasoned that the Domino's Pizza robbery did not count as a predicate conviction because at the time of the Kayani sentencing, Ramdass had not yet been "convicted" of that offense under the meaning of that term in

2. He was also awaiting trial on two other armed robberies, both involving assault with a deadly weapon.

the three strikes law—although he had been found guilty, judgment had not yet been officially entered. With only one predicate conviction besides the Kayani murder, the Virginia Supreme Court held that *Simmons* was inapplicable because on January 30, 1993 Ramdass was technically eligible for parole.

While this result is sound under the legal technicalities of Virginia law, in practical reality it was a certainty that Ramdass would be parole ineligible upon entry of the Kayani conviction. Indeed, at the Kayani sentencing, there was no practical difference between the Domino's Pizza robbery guilty verdict and the Pizza Hut robbery guilty verdict. From January 30, 1993 until February 18, 1993, no motions were outstanding which could have affected the Domino's Pizza conviction. Ramdass claims that as of January 30, 1993, his motion to strike the evidence as insufficient as a matter of law in the Domino's Pizza robbery case, *see* Va. Sup.Ct. R. 3A:15(a), had already been denied. So, except for the ministerial act of formally entering judgment, on January 30, 1993, Ramdass was in exactly the same position vis-a-vis the Domino's Pizza robbery as he was vis-a-vis the Pizza Hut robbery: the finding of guilt was subject only to a Rule 3A:15(b) motion to set aside the verdict and an appeal under Virginia Code § 17–116.05:3.[3] Thus, although it was a virtual certainty at his capital sentencing that Ramdass would be ineligible for parole, the Virginia Supreme Court found that *Simmons* was not applicable because Ramdass was still in some technical legal sense eligible for parole.

Nineteen days after the jury delivered Ramdass' sentence for the Kayani murder, the ministerial act of entering judgment on the Domino's Pizza robbery was completed, giving Ramdass his second predicate conviction. The Kayani sentence and judgment was officially imposed on April 6, 1993—more than one month after formal entry of judgments on the Pizza Hut robbery and the Domino's Pizza robbery. When judgment for the Kayani murder was entered, that judgment, combined with the Pizza Hut conviction and the Domino's Pizza conviction gave Ramdass his third strike, making him ineligible for parole. This was exactly the occurrence of which Ramdass had requested the jury be informed.

II.

The majority takes the view that the Virginia Supreme Court's interpretation of Virginia law settles the case. I disagree. There is no doubt that the Virginia Supreme Court was entitled to interpret the word "convicted" in Virginia Code § 53.1–151(A) in the way it did. Further, we are bound by this interpretation of state law by the highest state court. This case does not hinge on the word "convicted" in Virginia law, however. The case hinges upon the requirements of the Due Process clause of the Fourteenth Amendment. In *Simmons*, the Supreme Court defined one aspect of this Due Process clause. Admittedly, the right recognized in *Simmons* is dependent to some extent upon state law: The right depends upon state parole law; the right only applies to those for whom state law has eliminated the possibility of parole. But, the right is a federal right, nonetheless, and the scope and parameter of the *Simmons* right is a matter of federal constitutional law.

The majority rejects a "pragmatic, functional, nonlegalistic concept" of the *Simmons* right. I think the majority has overlooked the genesis of *Simmons*. *Simmons* was merely an extension of the rule in

3. The Commonwealth also points out that under Va.Code Ann. §§ 19.2–298 and 303 (Michie 1995), the court could suspend the imposition of the sentence or suspend the sentence in whole or in part. This is irrelevant, however, for two reasons. First, the Pizza Hut robbery was also subject to a § 19.2–303 suspension of the sentence. Second, regardless of whether a sentence has been suspended, nothing in §§ 19.2–298 or 19.2–303 erases the conviction for purposes of parole ineligibility under Virginia's three strikes statute.

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), that "elemental due process require[s] that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Skipper*, 476 U.S. at 5 n. 1, 106 S.Ct. 1669 (plurality opinion) (quoting *Gardner*, 430 U.S. at 362, 97 S.Ct. 1197), *quoted in part in Simmons*, 512 U.S. at 164, 114 S.Ct. 2187 (plurality opinion), and *quoted in id.* at 175, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment). As both the plurality opinion and the O'Connor concurrence[4] recognized, the fact that the defendant will never be released from prison "will often be the only way that a violent criminal can successfully rebut the State's case [of future dangerousness]." *Simmons*, 512 U.S. at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment); *id.* at 163–64, 114 S.Ct. 2187 (plurality opinion) ("In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant.... Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.").

This principle has full force in the case at bar. At capital sentencing, the prosecution presented evidence of Ramdass' future dangerousness. Some of this evidence included the fact that Ramdass had committed the Pizza Hut robbery and the Domino's Pizza robbery. More importantly, the Commonwealth repeatedly referred to the fact that Ramdass had committed many of his crimes while on parole. The Commonwealth mentioned the phrase "mandatory parole" several times, suggesting to the jury that the Commonwealth would have no choice but to parole Ramdass at some future date. In the face of this evidence of future dangerousness, Ramdass was rendered powerless to explain to the jury that, but for what was at that point a meaningless ministerial act, he was ineligible for parole under state law.[5] Thus, under *Gardner*, *Skipper*, and *Simmons*, Ramdass was denied his "elemental due process" right to deny or explain the Commonwealth's evidence of future dangerousness. *See Simmons*, 512 U.S. at 175 (O'Connor, J., concurring).

It is also important to remember the audience of the *Simmons* right. *Simmons* is concerned about the defendant's ability to present rebuttal evidence to a jury. Thus, *Simmons* is grounded in the right to present information which might affect a jury's decision making. Juries are not concerned about legal technicalities or remote and theoretical possibilities. They are concerned about practical realities. The Supreme Court recognized this point in *Simmons*. In *Simmons*, South Carolina argued that informing the jury that the defendant would be parole ineligible was inherently misleading because future contingencies such as legislative reform, commutation, and clemency might allow the release of the prisoner. The plurality rejected this argument, holding that the defendant could not be denied the right to rebut prosecution evidence of future dangerousness merely because of "hypothetical future developments." *Simmons*, 512

4. We have recognized Justice O'Connor's concurrence as the controlling opinion in *Simmons*. *See Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), *cert. denied*, — U.S. —, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Townes v. Murray*, 68 F.3d 840, 849 (4th Cir.1995).

5. The majority sets up a straw man by asserting that Ramdass has asked us to extend *Simmons* to situations in which a defendant is not ineligible for parole under state law. The majority relies in part on *Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.1999), *Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), and *Fitzgerald v. Greene*, 150 F.3d 357, 367 (4th Cir.1998), to defeat this straw man. In each of those cases, however, the defendant remained eligible for parole under state law even when all ministerial acts were completed. Of course *Simmons* did not apply to each of those defendants. Those cases are wholly inapposite here, where Ramdass' whole argument is based on his parole ineligibility under state law.

U.S. at 166, 114 S.Ct. 2187. The court reasoned that a parole ineligibility instruction was more accurate than no instruction at all, which would inevitably leave the jury to assume that the defendant would eventually be released. *Id.* Nothing in Justice O'Connor's concurrence indicates that she disagreed with the plurality that remote contingencies were irrelevant to the due process analysis.

In the case at bar, the majority hides its reliance on hypothetical future developments behind a state law shield. Because Ramdass did not become technically "parole ineligible" under Virginia law until judgment was formally entered on the Domino's Pizza robbery, the majority holds that *Simmons* is inapplicable. But at the time of the Kayani sentencing, only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible. The reason the Supreme Court rejected reliance on such future hypothetical developments is evident in the arbitrary result of the case at bar. At the time of the Kayani sentencing, the court had already rejected Ramdass' motions in the Domino's Pizza robbery case to set aside the jury's verdict before entry of judgment. *See* Virginia Sup.Ct. R. 3A:15(a). Formal entry of the conviction at that point was merely a ministerial act. Thus, for all realistic intents and purposes, it was a guarantee that Ramdass would be parole ineligible when the Kayani conviction was formally entered.

Further, there was at the time of the Kayani sentencing no practical basis for distinguishing between the Pizza Hut robbery guilty verdict and the Domino's Pizza robbery guilty verdict. Because the Rule 3A:15(a) motions had been denied for the Domino's Pizza robbery verdict, both verdicts were subject to an identical degree of uncertainty—either could be set aside only under a Rule 3A:15(b) motion or on appeal. Yet the majority asserts that the constitution requires us to treat the one as a certainty and the other as if it did not exist.

Splitting hairs when a man's life is at stake is not becoming to a judiciary or a legal system. I do not believe that due process requires or allows such arbitrary results. I would hold that, regardless of the technical, legalistic definition of "conviction" used by the Virginia Supreme Court, Radars had a constitutional due process right to inform the jury of the wholly accurate information that by the time the sentence they were deliberating was officially entered by the judge, he would be ineligible under state law for parole. I respectfully dissent.

PINE RIDGE COAL COMPANY, a corporation, Plaintiff–Appellee,

v.

LOCAL 8377, UNITED MINE WORKERS OF AMERICA, an unincorporated labor association; Local 6426, United Mine Workers of America, an unincorporated labor association, Defendants–Appellants.

No. 97–2666.

United States Court of Appeals, Fourth Circuit.

Argued May 7, 1999.

Decided Aug. 4, 1999.

Mine operator brought action against union under Labor Management Relations Act (LMRA) seeking recovery of costs resulting from unauthorized work stoppage. Following entry of summary judgment in favor of operator on liability issues, the United States District Court for the South-

implicated here, and a few cases in which the employee was told by the employer that he or she would be fired after a specified time period. In this case, Plaintiff was not told that she would be fired,[5] and when she asked whether her supervisor wanted her to leave, he replied that he did not. Plaintiff wants to rely on her subjective belief that she would be fired if she remained on the job in support of her right to resign and still be entitled to all the legal remedies afforded those who are fired in violation of the federal employment anti-discrimination statutes. This position runs counter to the law of this circuit, see, *e.g., Bristow,* 770 F.2d at 1254–55; *Raley,* 752 F.Supp. at 1279, and is not in keeping with the limited purpose of the constructive discharge doctrine.

Because Plaintiff's constructive discharge claim must fail, Plaintiff is not entitled to back pay or any other damages resulting from her leaving her employment with Defendants.

III. *CONCLUSION*

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED.

Bobby Lee RAMDASS, Petitioner,

v.

Ronald J. ANGELONE, Director of Virginia Department of Corrections, Respondent.

No. CIV. A. 2:96CV831.

United States District Court, E.D. Virginia, Norfolk Division.

Aug. 14, 1998.

Petitioner convicted of capital murder in state court sought habeas corpus relief, after exhausting state appellate and habeas procedures. The District Court, Jackson, J., held that: (1) some but not all claims that jury should have been informed that petitioner would receive life sentence without possibility of parole if death sentence was not imposed, were procedurally barred; (2) ineffective assistance of counsel claim based on failure to object to appointment of mental health expert did not preserve for habeas review claim of ineffective medical expert assistance; (3) state Supreme Court's determination that adequate proportionality review was performed was binding on federal court; (4) state Supreme Court's summary disposition of habeas petition was adjudication on merits entitled to deference in federal habeas corpus review; (5) state Supreme Court made unreasonable determination of facts and unreasonably applied a United States Supreme Court precedent in determining that the Supreme Court's *Simmons* decision, requiring that jury considering future dangerousness factor in assessing whether to impose death penalty be informed that capital murder defendant would receive life imprisonment without parole if not put to death, was inapplicable because parole was possible in present case; (6) petitioner did not receive ineffective assistance of counsel; (7) rule requiring ex parte hearings on defendant's requests for appointment of experts would not be applied for first time on collateral review; (8) exclusion of polygraph evidence did not violate petitioner's constitutional rights; (9) withholding of exculpatory materials did not constitute constitutional violation affecting conviction; (10) trial court's determination of state law matters would not be reviewed; (11) court would not rule that unadjudicated crimes evidence was inadmissible in capital murder case, as new rule would be created in collateral proceeding; and (12) capital murder sentencing statute was not unconstitutionally vague.

Petition granted in part, denied in part.

5. As for Plaintiff's allegation that she was repeatedly threatened with termination, the record reveals only two instances, one oral and one in writing, in which "termination" was mentioned to Plaintiff (a 11/10/95 meeting with Mr. Deutsch, and a 12/04/95 memorandum from Mr. Deutsch to Plaintiff). On both occasions, it was stated that failure to correct the dramatic drop in Plaintiff's sales performance (specifically, failure to generate new business and failure to generate a single sale out of over forty "qualified prospects") may result in Plaintiff being terminated.

1. Habeas Corpus ⇐319.1

A claim is "exhausted," for federal habeas corpus review purposes, if either the claim was presented to the state courts or, though never presented to the state courts, the claim if now presented to the state courts would be found to be procedurally defaulted. 28 U.S.C.A. § 2254(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Habeas Corpus ⇐422

Federal district court may not review claims that have been clearly and expressly defaulted under an independent and adequate state procedural rule. 28 U.S.C.A. § 2254(b).

3. Criminal Law ⇐1030(1)

Under Virginia law, to preserve an issue for direct appeal, a timely objection generally must be made at trial. Va.Sup.Ct.Rules, Rule 5:25.

4. Habeas Corpus ⇐287.1

With the exception of ineffective assistance of counsel claims, failure to raise a claim on direct appeal bars consideration of that claim in subsequent state habeas proceedings, under Virginia law.

5. Habeas Corpus ⇐898(1)

Under Virginia law, claims which are not presented in an original state habeas petition will not ordinarily be considered in a subsequent state petition. Va.Code 1950, § 8.01–654, subd. B, par. 2.

6. Habeas Corpus ⇐898(1)

Under Virginia law, no writ of habeas corpus is to be granted on basis of any allegation facts of which petitioner had knowledge at time of filing of any previous habeas petition. Va.Code 1950, § 8.01–654, subd. B, par. 2.

7. Habeas Corpus ⇐382

Both operative facts and legal principles must be presented to state court before claim may be subject of federal habeas corpus review. 28 U.S.C.A. § 2254.

8. Habeas Corpus ⇐404

When a petitioner can show both cause for and prejudice resulting from default of a claim on state procedural grounds, a federal court may extend habeas corpus review to a defaulted claim. 28 U.S.C.A. § 2254.

9. Habeas Corpus ⇐405.1

To establish "cause" sufficient to allow federal habeas corpus review of procedurally defaulted state claim, a petitioner must show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

10. Habeas Corpus ⇐409

To establish "prejudice" sufficient to allow federal habeas corpus review of procedurally defaulted state claim, a petitioner must show that the error worked to his actual and substantial disadvantage, not merely that it created a possibility of prejudice. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

11. Habeas Corpus ⇐401

If a habeas corpus petitioner cannot show "cause" and "prejudice" sufficient to excuse a state procedural default of his or her claims, the claims may still be reviewed when refusal to do so would result in a fundamental miscarriage of justice. 28 U.S.C.A. § 2254.

12. Habeas Corpus ⇐401

To establish "miscarriage of justice" sufficient to allow federal habeas corpus review of procedurally barred state claim, a petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent, or when death sentence is being challenged, petitioner must show by clear and convincing evidence that but for a constitutional error no reasonable juror would find petitioner eligible for the death penalty. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

13. Habeas Corpus ⇐369

Habeas petitioner's challenge to state supreme court's determination, that he was parole eligible rendering inapplicable United States Supreme Court's ruling that noneligibility for parole must be disclosed to jury when future dangerousness was issue in capital murder sentencing proceeding, was procedurally barred, due to failure of petitioner to request reconsideration of state supreme court's decision. U.S.C.A. Const.Amends. 8, 14; 28 U.S.C.A. § 2254.

14. Habeas Corpus ⇐339

State court claim that defendant charged with capital murder received ineffective assistance of counsel, when his attorney did not object to appointment of medical expert who allegedly would not work with defendant and put on medical health testimony, did not preserve for habeas review claim that court-appointed medical health expert was ineffective. U.S.C.A. Const.Amends. 5, 8, 14; 28 U.S.C.A. § 2254.

15. Habeas Corpus ⇐364

Failure of defendant, convicted of capital murder, to raise in state habeas proceedings claim that his counsel was ineffective for attempting to prove inconsistent defenses, precluded federal habeas corpus review of claim. U.S.C.A. Const.Amends. 5, 6, 8, 14; 28 U.S.C.A. § 2254.

16. Habeas Corpus ⇐423

State was precluded from defending habeas corpus claim of lack of expert assistance by asserting defense of procedural default; state had failed to assert defense in earlier state court appeals proceedings, choosing to address claims on merits. 28 U.S.C.A. § 2254.

17. United States Magistrates ⇐25

Trial court would deem habeas corpus point discussed by magistrate judge in report and recommendation, without objection by either side, to have not been procedurally defaulted. 28 U.S.C.A. § 2254.

18. Habeas Corpus ⇐770

State supreme court's determination, that it performed adequate proportionality review before approving death sentence, bound federal court conducting habeas review. 28 U.S.C.A. § 2254.

19. Habeas Corpus ⇐765.1

A state court decision that summarily dismisses a habeas corpus petitioner's claim as meritless is an adjudication on the merits entitled to deference on federal habeas corpus review, under the Antiterrorism and Effective Death Penalty Act. 28 U.S.C.A. § 2254(d).

20. Habeas Corpus ⇐503.1

State supreme court made "unreasonable determination of the facts," allowing for habeas corpus review of its conclusion that petitioner convicted of capital murder would not be subject to compulsory life sentence if death sentence was not imposed; state supreme court applied inconsistent reasoning in concluding that present offense could be counted toward determining if defendant had committed three violent felonies, as required for lifetime commitment without parole under state statute, even though sentencing in present case was not yet complete, while denying applicability of third violent felony for which he was convicted on grounds that sentencing had not occurred. 28 U.S.C.A. § 2254(b); Va.Code 1950, § 53.1–151, subd. B1.

21. Habeas Corpus ⇐498

State supreme court unreasonably applied United States Supreme Court precedent, in upholding death penalty, by claiming that Supreme Court's *Simmons* decision, requiring disclosure to jury asked to evaluate future dangerousness of fact that defendant would be sentenced to life imprisonment without possibility of parole if not sentenced to death, on grounds that mandatory life sentence was not required in present case; state supreme court read state statute precluding parole in illogical manner. 28 U.S.C.A. § 2254(b).

22. Criminal Law ⇐641.13(6)

It is not ineffective assistance of counsel to advise one's client not to testify. U.S.C.A. Const.Amends. 5, 6, 8, 14.

23. Criminal Law ⇐641.13(6)

Defendant charged with capital murder did not receive ineffective assistance when his attorney failed to challenge testimony regarding ballistic matters given by state witness qualified only as firearms identification expert. U.S.C.A. Const.Amends. 5, 6, 8, 14.

24. Criminal Law ⇐641.13(7)

Defendant charged with capital murder did not receive ineffective assistance of counsel who did not object when co-defendant testified that he received life sentence; there was no evidence that defendant would have received less harsh sentence had testimony in question been excluded. U.S.C.A. Const. Amends. 5, 6, 8, 14.

25. Criminal Law ⇐641.13(7)

Defendant charged with capital murder did not receive ineffective assistance of counsel who informed jury that defendant was bad person who might commit crimes in future, even though defendant claimed that attorney conceded major issue of future dangerousness for sentencing purposes; statement was designed to establish credibility with jury, and was followed by argument that defendant would not pose future danger as he would be locked up for rest of life if not sentenced to death. U.S.C.A. Const.Amends. 5, 6, 8, 14.

26. Criminal Law ⇐641.13(7)

Defendant charged with capital murder did not receive ineffective assistance on grounds that counsel did not adequately prepare for sentencing phase; counsel presented evidence of dysfunctional childhood through testimony of defendant, mother, brother and probation officer. U.S.C.A. Const.Amends. 5, 6, 8, 14.

27. Criminal Law ⇐641.13(6)

Defendant charged with capital murder did not receive ineffective assistance of counsel when his attorney allegedly did not research background of court-appointed mental health expert and discover expert's alleged pro-prosecution bias; there was no prejudice, as defendant never claimed that he was operating under mental defect when he committed offense. U.S.C.A. Const.Amends. 5, 6, 8, 14.

28. Courts ⇐100(1)

Rule established by federal courts requiring ex parte hearings on defendants' requests for appointment of experts would not be applied for first time to state court proceedings at federal habeas corpus review stage. U.S.C.A. Const.Amends. 5, 6, 8, 14; 18 U.S.C.A. § 3006A(e)(1); 28 U.S.C.A. § 2254.

29. Criminal Law ⇐388.5(1)
Homicide ⇐174(1)

Refusal of trial court to admit exculpatory results of polygraph test, pursuant to state evidentiary rule, does not constitute denial of capital murder defendant's right to present exculpatory evidence. U.S.C.A. Const.Amends. 5, 6, 14.

30. Criminal Law ⇐700(3)

Federal constitutional rights of defendant charged with capital murder were not violated when prosecutor withheld allegedly exculpatory statements made to police by co-defendants and other prospective witnesses; there was no showing that outcome of trial would have been different if withheld material had been disclosed. U.S.C.A. Const. Amends. 5, 6, 14.

31. Habeas Corpus ⇐453

Federal district court exercising habeas review of capital murder case would not disturb determination of state trial court, affirmed by state Supreme Court, declining to admit evidence tending to show witness' character and propensity for criminal conduct; only state criminal procedure and evidence points were involved. U.S.C.A. Const. Amends. 5, 6, 14; 28 U.S.C.A. § 2254.

32. Habeas Corpus ⇐490(6)

Federal district court exercising habeas corpus review of state capital murder case would not rule that admission of unadjudicated criminal conduct was impermissible in penalty phase; affirmative response would create new rule, generally not created by federal district courts on collateral review. U.S.C.A. Const.Amends. 5, 6, 14; 28 U.S.C.A. § 2254.

33. Homicide ⇐351, 357(6)

Virginia capital murder sentencing statute was not unconstitutionally vague, despite use of term "future dangerousness." U.S.C.A. Const.Amend. 14; Va.Code 1950, § 18.2–18.

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John M. Ryan and Nash F. Bilisoly, Vandeventer, Black, Meredith and Martin, LLP, Norfolk, VA, Michele J. Brace, Robert Edward Lee, Jr., Mark E. Olive, Virginia Capital Representation Resource Center, Richmond, VA, for Bobby Lee Ramdass.

OPINION AND FINAL ORDER

JACKSON, District Judge.

In January, 1993, Petitioner was convicted in the Circuit Court of Fairfax County, Virginia for the September, 1992 murder of Mohammad Z. Kayani, a convenience store clerk. Pursuant to the jury's recommendation, on April 2, 1993, the court sentenced Petitioner to death. Subsequently, Petitioner exercised his state appeals to no avail. On March 11, 1997, Petitioner filed an amended petition for a federal writ of habeas corpus, pursuant to 28 U.S.C. § 2254,[1] alleging violations of federal constitutional rights during his conviction and sentencing. This matter comes before the Court on Respondent's April 28, 1997 motion to dismiss the petition. On June 3, 1997, Petitioner filed a response to Respondent's motion to dismiss. On June 26, 1997, Respondent filed a reply to Petitioner's response.

Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia, the matter was referred to a United States Magistrate Judge for Report and Recommendation ("R & R"). On February 27, 1998, the Magistrate Judge filed his R & R. He found merit in one ground in the petition and recommended that the motion to dismiss be denied and that Petitioner's case be remanded for resentencing.

By copy of the R & R, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On March 30, 1998, this Court received "Petitioner's Objections to Magistrate Judge's Report and Recommendation" and "Respondent's Objections to the Magistrate Judge's Report and Recommendation." On April 13, 1998, both parties filed respective replies to the objections.

With some exceptions, Petitioner objects to the Magistrate Judge's recommendations to deny certain claims on the basis of procedural default. Of the claims the Magistrate Judge addressed on the merits, Petitioner does not contest the ultimate recommendation to order Petitioner's resentencing; however, he does object to the recommendations to deny the remaining claims on the merits. Further, Petitioner maintains that he is entitled to conduct discovery and present evidence on his claims which were denied on the merits. Respondent disagrees with the standard the Magistrate Judge utilized in concluding that certain claims were not procedurally defaulted and the recommendations that certain claims were not procedurally defaulted. Additionally, Respondent objects to the ultimate recommendation to remand Petitioner's case for resentencing. Both parties object to the standard of review the Magistrate Judge applied when evaluating claims on the merits.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the Court, having reviewed the record in its entirety, shall make a *de novo* determination of those portions of the Magistrate Judge's R & R to which the parties specifically objected. The Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

I. FACTS AND PROCEDURAL HISTORY

The R & R contains a detailed statement of the facts surrounding the crime, Petition-

1. On February 14, 1997, Petitioner filed his initial petition.

er's conviction and sentencing, and subsequent state appeals. (R & R 2–17.) The Court adopts the Magistrate Judge's explication of facts, with some modifications. The facts and procedural history are as follows.

A. Facts

During the night of September 1, 1992, and early morning of September 2, 1992, Petitioner and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh,[2] Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. The restaurant was closed. Instead, the men, including Petitioner, decided that they would rob persons at a 7–Eleven store on Buelah Street in Fairfax County.

Near one o'clock on the morning of September 2, 1992, the five men entered the 7–Eleven store. Petitioner entered first and "drew" his pistol on Kayani, a clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and to not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes, Kool Aid and lottery tickets from the store's stock.

After Petitioner ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Petitioner squatted next to Kayani and yelled at him to open the safe "or I'll blow your f— head off.[3]" *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566, 568 (Va.1993). At approximately the same time, Wilson fired his pistol at one of the customers lying on the floor. (1/27/93 Tr. at 206–07.) Immediately thereafter, Singh, standing behind Petitioner, saw Petitioner shoot Kayani in the head on his second attempt to get the weapon to fire. (1/27/93 Tr. at 211–12.) Testifying about the precise moment of the shooting, Singh stated that Petitioner "[c]licked it once and it didn't go off, clicked it again and it went off." (*Id.*)

Just after Petitioner shot Kayani, Ramirez testified that he returned from a back room in the store. Ramirez saw Petitioner laughing as he stood over Kayani's body. (1/27/93 Tr. at 145.)[4] Shortly thereafter, Ramirez opened the front door and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Petitioner to "[c]ome on." (*Id.* at 146.) However, Petitioner was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." (*Id.*) One of the customers also heard the clicking of the gun as Petitioner left. (1/27/93 Tr. at 125, 129–30.)

When they got in the car, Ramirez heard Petitioner ask Wilson, "[w]hy didn't you get rid of the people on the floor?" (*Id.* at 146.) After the men divided the robbery proceeds at Singh's home, Petitioner told Ramirez, "[d]on't tell anybody about this [o]r I'll kill you and I'll kill your whole family." (1/27/93 Tr. at 146–47.)

Singh, a co-owner of the gun with Petitioner, testified that the gun would not fire unless held at a certain angle because the bullets in the cylinder were not the right size for the gun. (*Id.* at 213.) Singh was corroborated by Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, who later examined and test-fired the gun. (*Id.* at 245, 248.) Mason testified that the 9 millimeter cartridges Petitioner used in the gun were smaller than the .38 caliber cartridges designed for the gun. Consequently, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward in the cylinder to be struck by the firing pin. (*Id.* at 250–51.) Mason further testified that when the muzzle was pointed up, the cartridges slid back closer to the firing pin, and the gun could be fired. (*Id.* at 251.)

2. For this crime, Singh had plead guilty to murder as a principal in the second degree, robbery, and use of a firearm in the commission of a robbery as a principal in the second degree. He testified that he faced three life sentences plus six years. (1/27/93 Tr. 202.) In exchange for his testimony, charges for other robberies in which he had participated were dropped.

3. Another employee of the 7–Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

4. Later, Ramirez heard Petitioner say that he shot Kayani because he "took too long." (1/27/93 Tr. at 147.)

On direct, after stipulating as to her expertise, the medical examiner testified that the bullet which killed Mr. Kayani entered the left side of his head, just above the left ear, traveled forward, upward and rightward exiting out the right side of his head. (*Id.* at 99–100.) On cross examination, the medical examiner was questioned in more detail about the track of the bullet through the head and revealed that powder burns and debris were found on Kayani's head. (*Id.* at 102.)

Based on the evidence, the jury convicted Petitioner of capital murder and the use of a firearm in the commission of a felony. The case proceeded to the capital sentencing phase. The Commonwealth, in seeking the death penalty, relied solely upon the "continuing serious threat to society" condition, also known as "future dangerousness." In support of its position, the Commonwealth introduced evidence of Petitioner's use of a firearm and participation in the robbery of a Pizza Hut on August 25, 1992; robbery on August 29, 1992, of a hotel night clerk, who was physically beaten by Petitioner and threatened with a gun during the robbery; use of a firearm and robbery of a Domino's Pizza restaurant on August 30, 1992; and a second robbery and attempted murder, on August 30, 1992, of a taxi driver, who was shot in the head by Petitioner. At the time of trial, Petitioner had been convicted of the Pizza Hut and the Domino's Pizza crimes and formally sentenced for the Pizza Hut robbery. At the time judgment was imposed by the court for the 7–Eleven crimes, Petitioner had additionally been convicted and sentenced for the hotel robbery and formally sentenced for the Domino's robbery.

In opening statements, which had been reserved, defense counsel argued that Petitioner need not be sentenced to death on the basis of future dangerousness because he was already required to serve at least 99 years in jail. The length of the term precluded release and eliminated any future threat to society. Toward the end of the opening, trial counsel stated: "Bobbie Lee Ramdass was a bad boy. He's a bad man. He's committed crimes of violence in the past. He won't stand up here and tell you that he won't commit crimes of violence in the future." (1/29/93 Tr. 98.)

Trial counsel informed the jury of Petitioner's extensive juvenile record. Beginning in 1985, Petitioner came before the Court for a purse snatching, for which he received probation, (1/29/93 Tr. at 198–99); theft of a moped and a burglary, for which he was sentenced to a juvenile facility, (1/29/93 Tr. at 200); being a juvenile escapee, (1/29/93 Tr. at 201); and robbery as a juvenile, for which he received an adult sentence to Southampton prison, (1/29/93 Tr. at 17–18, 202). The jury also learned that Petitioner acquired his first gun at age thirteen or fourteen, while he was selling drugs, (1/29/93 Tr. at 149–51); that he was in possession of a loaded gun when he was arrested, as a juvenile, and charged with robbery, (1/29/93 Tr. at 24); and that he violated his parole, which began on May 21, 1992, by acquiring a gun on July 4, 1992, less than sixty days later, (1/29/93 Tr. at 85–86, 202).

Furthermore, the defense presented evidence of a bleak, abusive, unstructured childhood. Petitioner was physically and emotionally abused and raised in conditions of severe deprivation. There was no positive guidance.

Petitioner's brother, Mark Ramdass, testified on Petitioner's behalf. After admitting that he would not have appeared without being subpoenaed, Ramdass described his brother's efforts to protect him and to try to keep him out of trouble. (1/29/93 Tr. 103–05.) He also acknowledged his brother's numerous encounters with the law and incarceration, and admitted his own criminal activities, resulting in two felony convictions. (*Id.* at 112.) At one time, Petitioner and the witness were both at Southampton Correctional facility. (*Id.* at 113.)

Petitioner's mother testified that she was one of twenty-one children and that she was sexually abused and ran away from home at an early age. (*Id.* at 217.) She was working as a topless dancer when Petitioner was born. (*Id.* at 219.) She acknowledged being convicted of writing a bad check and two assault and battery charges. She also confirmed that she twice lost custody of her children for neglect. (1/29/93 Tr. 227–28.)

She described how Petitioner was physically abused by a boyfriend and how she tanght petitioner to defend himself. She admitted assaulting a former boyfriend and a neighbor. (*Id.* at 232.)

Jennifer Joffe, a Virginia probation/parole officer, was called by the defense. She had prepared the probation report following Petitioner's 1988 conviction for robbery. (*Id.* at 115.) Joffe presented evidence of Petitioner's home environment and difficult upbringing. On cross-examination, she acknowledged that none of the counseling reports prepared on Petitioner revealed the presence of psychoses or serious mental problems. (*Id.* at 126.) She also concurred in the assessment of Petitioner as immature, impulsive, unremorseful, and possessed of a great potential for violence. (*Id.* at 127.) In response to the question "[y]ou felt he was a danger on the street," she responded, "[y]es." (*Id.* at 128.)

Petitioner did not call the court-appointed health expert to testify as to Petitioner's mental health or mitigating circumstances. After an evaluation, the court-appointed expert concluded that there were no mitigating circumstances in Petitioner's case.

Finally, though Petitioner did not testify in the guilt phase, Petitioner did testify in the sentencing phase. (1/29/93 Tr. 132–216.)

While the jury was deliberating on punishment during the penalty phase of the capital murder proceeding, they submitted a question to the court stated as follows: "[I]f the defendant is given life, is there a possibility of parole at some time before his natural death," (1/29/93 Tr. at 278). The court responded: "[I]f you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (1/29/93 Tr. at 281.) The Court did not directly answer the jury's question.

Ultimately, on January 30, 1993, the jury unanimously recommended a sentence of death for Petitioner. On April 2, 1993, the court imposed judgment upon Petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder.

B. Procedural History

On September 2, 1992, Petitioner murdered Muhammad Kayani, a clerk employed at a 7–Eleven convenience store on Buelah Street in Fairfax County, Virginia. He was arrested on September 11, 1992, for an earlier robbery, together with other defendants, and ultimately connected to the 7–Eleven robbery and murder. On September 21, 1992, Petitioner was indicted by a Fairfax County grand jury on capital murder, armed robbery, and use of a firearm in the commission of a robbery.

Counsel was appointed in timely fashion, pretrial discovery was promptly pursued. On November 2, 1992, the trial court denied Petitioner's request to make an ex parte showing of need for expert assistance. (11/2/92 Tr. 20–32.) On December 8, 1992, the trial court denied Petitioner's motion for a physical exam concluding that there was a lack of information sufficient to establish the need for an exam. (12/8/92 Tr. at 6.) Counsel then proffered that he needed the exam to determine whether Petitioner suffered from a reflexive disorder. (*Id.* at 7–8.) Next, the trial court denied Petitioner's request for appointment of an expert investigator, but did appoint a third attorney to the defense team. (*Id.* at 22.) Next, the trial court declined to order the Commonwealth to turn over to Petitioner statements Petitioner claimed were exculpatory. (*Id.* at 44.)

The matter came on for trial on January 26, 1993. The first day consisted of jury *voir dire* and selection. At trial, Petitioner, by counsel, entered a plea of guilty to the robbery charge which was accepted by the court following the normal colloquy. However, at the request of the Commonwealth Attorney, and over the objection of defense counsel, a finding with regard to Count II of the indictment, robbery, was withheld pending the receipt of evidence of the other offenses.

At the conclusion of the evidentiary portion of the trial, the jury returned a verdict of guilty of capital murder and guilty of use of a firearm in the commission of a felony. Petitioner was sentenced to four years in the penitentiary for the latter crime. Following the jury verdict, the court found Petitioner guilty with respect to Count II, robbery, finding on the record that Petitioner's plea of guilty was freely and voluntarily given. The defense waived preparation of a presentence report, but the court, *sua sponte*, ordered the preparation of a presentence report on the offense of robbery. Thereafter, the jury heard evidence with regard to punishment on the capital murder charge, and following argument and instruction by the court, returned a verdict of death.

In anticipation of the preparation of the presentence report, the matter was set over for further proceedings on March 3, 1993. Sentencing was continued from that date, however, until April 2, 1993, at which time the court imposed judgment upon Petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder; four years in the penitentiary, in conformity with the jury verdict for use of a firearm in the commission of a felony; and life for the robbery, incident to Petitioner's plea of guilty.

Trial counsel pursued a direct appeal on behalf of Petitioner, assigning the following errors:

1. The Trial Court erred in denying the Appellant's Motion For A Bill of Particulars, thereby denying Appellant his rights protected by the Sixth and Fourteenth Amendments of The United States Constitution and the Constitution of Virginia.
2. The Trial Court erred, and denied the Appellant his Fifth, Sixth and Fourteenth Amendment rights, and his Rights protected by The Virginia Constitution through the denial of his motion for discovery of co-defendant polygraph questions and answers for impeachment purposes.
3. The Trial Court erred in granting an extended reasonable doubt instruction.
4. The Trial Court erred in denying the jury instruction utilized in *Commonwealth v. Wright*, tried in the same circuit and approved by the Virginia Supreme Court.
5. The Trial Court erred in denying the defendant's proffered jury instruction regarding the inconsistent testimony of Shane Singh.
6. The Trial Court erred in admitting evidence of the Defendant's unadjudicated misconduct in violation of the United States and Virginia Constitutions.
7. The Trial Court erred in denying the Defendant's proffered sentencing jury instruction "B–S" which instructed the jury that they must all agree that the Defendant would be a future danger.
8. The Trial Court erred, and denied Defendant his rights protected by the Virginia and United States Constitutions 5th and 14th Amendment Rights, by denying Defendant's proffered sentencing jury instruction "E–S" which instructed they jury as to the standard of proof required to be convinced of the unadjudicated misconduct of the Defendant.
9. The Trial Court erred in refusing to respond to a jury question, during the sentencing stage of the trial, that Defendant would not be eligible for parole upon his conviction of capital murder in the instant matter in violation of § 19.2–264.4 of the Virginia Code and the Eighth and Fourteenth Amendments to the United States Constitution.
10. The Trial Court erred in denying Defendant the right to raise his inability to make parole upon conviction of the capital murder in the instant case.
11. The imposition of the death penalty by electrocution is cruel and unusual punishment, in violation of the Virginia Constitution and the Eighth Amendment of the United States Constitution and the Trial Court erred in finding to the contrary.
12. The Trial Court erred in withholding a finding of guilt on the underlying robbery charge, and further erred, and denied the Defendant's 5th and 14th Amendment rights by refusing to sentence the Defendant without a presentencing report despite its waiver by Defendant and his counsel and the fact that the Defendant had been incarcerated the entire period of time since the preparation of the prior presentencing report.
13. The Trial Court erred in denying the defendant funds for expert witnesses, medical doctors, and private investigators.

14. The Trial Court erred in denying the Defendant a medical expert to perform a competent physical examination to ascertain his physical disabilities.

15. The Court erred in denying the Defendant discovery regarding future dangerousness prior to trial.

16. The Trial Court erred in denying Defendant's Motion to Dismiss on the basis that the Virginia Death Penalty Statute is unconstitutional.

17. The Trial Court erred in denying defendant's motion to dismiss on the basis of the denial of due process under the United States and Virginia Constitutions.

18. The Trial Court erred in refusing to dismiss a juror who was personally acquainted with one of the Commonwealth (police) witnesses, and an additional juror who had preconceived notions regarding the brutality of the crime.

19. The Trial Court erred and violated his Fifth, Eighth and Fourteenth Amendment Rights in refusing to permit inquiry into whether the jurors held the belief that the Defendant would be executed if the jury were to impose the death sentence.

20. The Trial Court erred in denying Defendant the opportunity to *voir dire* the jury regarding specific mitigation circumstances about which they would be generally instructed, and further erred in denying Defendant's motion to exclude those jurors that were unable to consider specific mitigating circumstances in sentencing.

21. The Trial Court erred in denying the Defendant's motion for *in-camera* requests for expert witnesses in violation of his Fourth. Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution and rights protected by the Virginia Constitution.

22. The Trial Court erred in denying Defendant's motion for a private investigator to aid the defense in the preparation of trial in violation of his Fifth and Fourteenth Amendment Rights and his rights protected by the Virginia Constitution.

23. The Trial Court erred in denying the Defendant's motion that it review evidence to determine whether evidence was or was not exculpatory rather than leaving such determination to the Commonwealth Attorney in violation of his Sixth and Fourteenth Amendment Rights and rights protected by the Virginia Constitution and in violation of the discovery rules of this court.

24. The Trial Court erred in permitting hearsay testimony, regarding personal information about the victim, via the first page of the medical examiners reports without redacting hearsay portions.

25. The Trial Court erred in sustaining objections regarding the testimony about the lack of fingerprints left by Mr. Ramirez in the 7–11; as to the specific location of Mr. Ramirez on dates preceding this incident; in denying the Defendant's probing into the background of Commonwealth witness Mr. Ramirez, and in denying the defendant the opportunity to examine Mr. Ramirez and Mr. Singh regarding other offenses in which the witnesses were involved thereby denying him right of confrontation in violation of the Sixth Amendment of the Constitution and rights protected by the Virginia Constitution.

On November 5, 1993, the conviction was affirmed. *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (Va.1993). The court noted that Assignments 7, 17, 18, 19, 20, and 24 were not briefed and concluded that those issues had been waived. With regard to the remaining issues, the court addressed and ruled on the issues on the merits.

Following denial of the appeal, a petition for certiorari was filed in the United States Supreme Court. While the petition addressed multiple issues, including discovery, unadjudicated misconduct, constitutionality of the death sentence, expert assistance, and potentially exculpatory evidence, only one assignment was significant: "Whether the Court's refusal to respond to [the] jury inquiry as to Defendant's parole status violates the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution."

There was no action for several months, but on June 17, 1994, the United States Supreme Court decided the case of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and ruled that

where a defendant's future dangerousness is at issue and state law prohibits a defendant's release on parole, due process requires the sentencing jury to be informed that the defendant is parole ineligible.

Three days later, on June 20, 1994, certiorari in petitioner's case was granted and the case was remanded to the Virginia Supreme Court for further consideration based upon the Supreme Court's opinion in *Simmons*. *Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

As presented by Petitioner to the Supreme Court of Virginia on remand, the sole issue in *Simmons* was "[w]hether the due process clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." Respondent argued that *Simmons* was not raised in the trial court; that Petitioner was eligible for parole and *Simmons*, therefore, did not apply; and that *Simmons* was irrelevant because the sentencer can always consider parole ineligibility. On November 4, 1994, the Supreme Court rejected Petitioner's claim, found that Petitioner was eligible for parole, and concluded that *Simmons* did not apply. *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (Va.1994).

Once again a petition for writ of certiorari was filed in the Supreme Court of the United States, raising many of the same issues originally presented, but the petition was rejected on April 24, 1995. *Ramdass v. Virginia*, 514 U.S. 1085, 115 S.Ct. 1800, — L.Ed.2d — (1995).

On May 11, 1995, counsel was appointed to pursue a petition for writ of habeas corpus in the courts of the Commonwealth. On August 30, 1995, Petitioner instituted a petition for writ of habeas corpus in the Virginia Supreme Court alleging the following broad categories as grounds for relief:

1. Denial of effective assistance of counsel for reasons addressing trial strategy (or lack thereof), improper *voir dire*, venue, jury sequestration, handling of defense experts, handling of evidence, improper preparation for examination of prosecution experts, inadequate pretrial investigation, improper handling of a co-defendant's testimony, objections addressing the murder weapon and the forensics expert, and improper handling of the sentencing phase.

2. Prosecutorial misconduct, consisting of the withholding of exculpatory evidence; use of highly prejudicial evidence (in the form of photos, the autopsy report, unadjudicated misconduct, and a co-defendant's sentence); and improper evidence regarding parole.

3. Trial court error in the form of a delayed finding of guilt on the robbery charge; failure to strike members of the jury panel challenged for cause; failure to require the prosecution to produce certain purportedly exculpatory evidence; admission of evidence that was either highly prejudicial or not preceded by a proper foundation; instructional errors, a *Simmons* error; and the denial of an investigator.

4. The Virginia Supreme Court proportionality review was inadequate.

On January 19, 1996, the court denied an *ex parte* motion for expert assistance and an investigator. On March 18, 1996, the court denied the habeas petition without an evidentiary hearing.

On April 19, 1996, counsel filed a petition for rehearing in the state habeas proceeding, alleging as grounds for the rehearing that Petitioner was denied the effective assistance of counsel (for a variety of reasons previously presented), that the prosecution engaged in misconduct prejudicial to Petitioner, and that the trial court denied Petitioner's constitutional rights in numerous respects. Some issues were raised for the first time, and the *Simmons* claim was well articulated. The petition for rehearing was denied June 7, 1996.

The Circuit Court of Fairfax County set Petitioner's execution for August 28, 1996. On June 25, 1996, Petitioner filed a motion to

stay execution, but the motion was denied by the Virginia Supreme Court on July 17, 1996.

On August 14, 1996, incident to plans to present a federal habeas petition, Petitioner moved for a stay of execution and for leave to proceed *in forma pauperis*, and for appointment of counsel in federal court.

On August 15, 1996, the execution was stayed. Thereafter, on September 11, 1996, counsel was appointed for the purpose of filing the current action.

II. CLAIMS PRESENTED

Petitioner sets forth the following claims as grounds for federal habeas relief.

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth amendments (The *Simmons* claim).

B. Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Eighth and Fourteenth amendments.

C. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

1. Trial counsel's trial strategy was either nonexistent or internally inconsistent.
   a. Petitioner was unreasonably advised not to testify.
   b. Trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position, thus establishing the requisite intent.
   c. Trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner.
   d. Trial counsel failed to cross examine the prosecution's "firearms identification" expert.
   e. Trial counsel failed to obtain expert assistance.
2. Trial counsel failed to object to co-defendant's testimony about his life sentence.
3. Trial counsel failed to establish Petitioner's parole ineligibility.
   a. Trial counsel failed to request schedule adjustments which would have created Petitioner's parole ineligibility.
   b. Trial counsel failed to challenge the determination that Petitioner was eligible for parole.
4. Trial counsel failed to conduct adequate *voir dire*.
5. Trial counsel conceded the sole aggravating factor in the penalty phase.
6. Trial counsel failed to adequately prepare for the penalty phase.

D. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

E. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an *ex parte* showing of need for expert assistance.

F. The trial court's refusal to allow Petitioner exculpatory statements, the trial court's refusal to review such statements *in camera* and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

G. The Virginia death penalty statute on its face, and as applied, violates the Sixth, Eighth and Fourteenth amendments.

H. Petitioner was denied his right to confrontation in violation of the Sixth amendment.

I. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

J. The Virginia Supreme Court failed to perform an adequate review of Petitioner's death sentence for proportionality and for passion, prejudice or other arbitrary factors.

K. Virginia's capital murder sentencing statute is unconstitutional.

III. PROCEDURAL DEFAULT

[1] Title 28 U.S.C. § 2254(b) requires exhaustion of claims before presentment to federal courts. A claim is exhausted if either the claim was presented to the state courts or, though never presented to the state courts, the claim if now presented to the state courts would be found to be procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Respondent objects to the standard the Magistrate Judge employed for determining when a claim has been procedurally defaulted. In addition, in most cases, each party objected to the Magistrate Judge's underlying recommendation as to whether a particular claim was procedurally defaulted. Accordingly, the Court will first outline the rules of procedural default and its exceptions. The Court will then determine whether each individual claim is preserved or defaulted.

Standard for Procedural Default

[2–5] This Court may not review claims that have been clearly and expressly defaulted under an independent and adequate Virginia state procedural rule. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. Under Virginia law, to preserve an issue for direct appeal, a timely objection generally must be made at trial. Va. S.Ct. R. 5:25; *Coppola v. Warden of Virginia State Penitentiary*, 222 Va. 369, 282 S.E.2d 10 (Va.1981). Further, excepting ineffective assistance of counsel claims which may first be presented on collateral review, failure to raise a claim on direct appeal bars consideration of that claim in subsequent state habeas proceedings. *Walker v. Mitchell*, 224 Va. 568, 299 S.E.2d 698, 699 (Va. 1983); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (Va.1974). Finally, claims which are not presented in an original state habeas petition will not ordinarily be considered in a subsequent state petition. Va.Code § 8.01–654(B)(2).

In his motion to dismiss, Respondent argued that certain arguments supporting some of Petitioner's claims were never presented to the state courts and, therefore, the arguments were procedurally defaulted pursuant to Va.Code § 8.01–654(B)(2). The Magistrate Judge concluded: "A claim raised in a federal petition for writ of habeas corpus must be essentially the same claim as that presented in state proceedings." (R & R 26.) Additionally, in several instances, the Magistrate Judge stated that where a claim was raised in the state proceedings, though the argument was not necessarily in the exact same nature, tenor or form, the matter was not procedurally defaulted. (*See, e.g.*, R & R 33, 36, 37.) Citing *Breard v. Pruett*, 134 F.3d 615 (4th Cir.1998) and *Mallory v. Smith*, 27 F.3d 991 (4th Cir.1994), Respondent objects and reiterates his contention that the argument presented to the federal court must be precisely the same argument presented to the state courts. Respondent claims that the Magistrate Judge considered arguments which were never presented to the state courts, but "now are presented under the heading of a claim that arguably was presented in state court."

[6, 7] Virginia Code § 8.01-654(B)(2) establishes a bright-line rule providing that a habeas petition "shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.". The Fourth Circuit has held that both the operative facts and legal principles, *i.e.* the argument, must be presented to the state courts or else the claim is barred from federal review. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997). Accordingly, Respondent's objection to the standard the Magistrate Judge used to for determinations of procedural default is **SUSTAINED.**

Excuse of Procedural Default

[8–12] Despite the rule barring federal review of claims which have been defaulted on adequate and independent state grounds, two exceptions exist which excuse procedural default and permit federal review. First, where a petitioner can show both cause for and prejudice resulting from his default, a federal court may review a defaulted claim. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. With respect to "cause," a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct.

2639, 91 L.Ed.2d 397 (1986). With respect to "prejudice," a petitioner must show that the error worked to his "*actual* and substantial disadvantage," not merely that it created a "*possibility* of prejudice." *Id.* at 494, 106 S.Ct. 2639 (emphasis in original), *quoting United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Second, if a petitioner cannot show "cause" and "prejudice" sufficient to excuse a procedural default, his claims may still be reviewed where refusal to do so would result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. To meet the miscarriage of justice exception, the petitioner must show either that a constitutional violation has probably resulted in the conviction of one who is actually innocent, *Schlup*, 115 S.Ct. at 867, or, for those petitioners who are sentenced to death, "by clear and convincing evidence that but for a constitutional error, no reasonable juror would find him eligible for the death penalty ...."[5] *Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the eighth and fourteenth amendments (The *Simmons* claim).

[13] The Magistrate Judge found that this claim was not procedurally defaulted because, regardless of the precise nature or form of the argument, the issue of whether the sentencing jury was entitled to know Petitioner's parole eligibility status was presented both on direct appeal and in the state habeas proceeding. (R & R 33–34.) Respondent objects contending that the Magistrate Judge considered legal arguments which were never presented to the state courts and, therefore, may not now be considered by this Court.

At no point has Respondent directed the Court's attention to any new arguments which should have been raised in state court. In his response to the motion to dismiss, Petitioner identified two purportedly new arguments: (1) on remand from the United States Supreme Court, the Virginia Supreme Court exceeded its constitutional authority and determined Petitioner's parole eligibility status and (2) on remand from the United States Supreme Court, the Virginia Supreme Court's decision that Petitioner was parole eligible was arbitrary. Petitioner argued that neither claim was procedurally defaulted because Petitioner could not challenge an error which did not arise until the Virginia Supreme Court handed down its opinion on the *Simmons* issue, and, once the decision was rendered, Petitioner was not required to submit a discretionary petition for rehearing in order to exhaust his remedies. In his reply to the Petitioner's response, Respondent summarily dismissed Petitioner's arguments as "silly," claiming that nothing prevented Petitioner from raising these arguments to the Virginia Supreme Court and, therefore, they are now barred from federal review.

The Court finds that the arguments have been procedurally defaulted. After the Virginia Supreme Court issued its decision declaring that Petitioner was parole eligible, Petitioner did not request reconsideration of the decision, rather, Petitioner presented these allegedly new arguments to the United States Supreme Court on an unsuccessful second request for review. Pursuant to *Slayton*, 215 Va. 27, 205 S.E.2d 680, Petitioner could have presented the arguments to the Virginia Supreme Court in his initial habeas petition because the issues could not have been raised at trial or on direct appeal. Petitioner, however, did not present the arguments; thus, the argument would now be procedurally defaulted pursuant to Va.Code § 8.01–654(B)(2). Accordingly, the arguments may not be considered by this Court, and Respondent's objection is **SUSTAINED.** These new arguments will not be addressed on the merits, but the preserved *Simmons* issues will be discussed.

B. Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Eighth and Fourteenth amendments.

Petitioner claims that he was denied the constitutional right, pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), to the assistance of a mental health expert. The Magistrate Judge determined that the claim was procedurally defaulted because it was neither presented on direct appeal nor in the state habeas petition. (R & R 34–35.) Petitioner objects arguing that the language in the state habeas petition was a dual claim which clearly argued a violation of *Ake* in addition to ineffective assistance of counsel for failure to secure a mental health expert.

[14] The Court finds that the *Ake* claim has been procedurally defaulted because it was not presented to the state courts. In his state petition, habeas counsel claimed that trial counsel was ineffective for failing to object to a court-appointed mental health expert who would not work with Petitioner and to put on expert mental health testimony. Petitioner did not, however, explicitly argue that the court-appointed mental health expert was ineffective. Accordingly, Petitioner's objection is **OVERRULED.** The *Ake* ineffective mental health expert claim will not be addressed on the merits.

C. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

1. Trial counsel's trial strategy was nonexistent or internally inconsistent.

[15] Petitioner's claim here is two-fold. First, Petitioner claims that trial counsel's strategy was ineffective because the choice of defenses was inconsistent.[6] Second, Petitioner claims that trial counsel's strategy was ineffective because they failed in four instances to produce any evidence on Petitioner's intent. The Magistrate Judge determined that any claim of ineffective assistance of counsel based on inadequate trial strategy was not presented to the state courts and, accordingly, was procedurally defaulted. (R & R 35.) Of the four instances in which Petitioner claims intent evidence should have been produced, the Magistrate Judge evaluated them individually and determined that two were procedurally defaulted: (1) that Petitioner was unreasonably advised not to testify and (2) that, as to the location of the bullet, trial counsel was ineffective in failing to obtain experts to assist in the defense of the case.[7] (R & R 35–36.) Petitioner objects arguing that the trial strategy claim is a "convenient umbrella" for the underlying sub-claims which were all presented to the state courts. Petitioner concludes, therefore, that both the trial strategy claim and the underlying sub-claims regarding intent evidence are preserved. With respect to any remaining ineffectiveness claims for failing to obtain expert assistance, which the Magistrate Judge found were not procedurally defaulted, Respondent objects.

The Court finds that the argument that the defenses were inconsistent is procedurally defaulted. In the state habeas petition, trial counsel was not charged with being ineffective for attempting to prove seemingly

5. In his motion to dismiss, Respondent argued that the "actual innocence of the death penalty" doctrine no longer provides a gateway for petitioners to have their defaulted claims reviewed on habeas. In support of this position, respondent pointed to 28 U.S.C. § 2264(a). Respondent did not pursue this argument in his objections and, for two (2) reasons, the Court offers no opinion on this argument. First, it is not clear to this Court whether Congress's intention in writing § 2264(a) was to completely eliminate the "actual innocence" exception in capital cases or merely to strictly limit what could be considered "cause" under the cause and prejudice exception. Second, because this Court has previously found that Virginia is not an "opt-in" state, (Mem. Op. and Order, Dec. 6, 1996.), § 2264(a) does not apply.

6. That is, it was ineffective for trial counsel to argue: "The bullet did not come from Defendant's gun but if you find that it did, then Defendant did not intentionally shoot the victim but did so accidentally."

7. The Magistrate Judge reviewed on the merits the sub-claims that (1) trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position, thus establishing the requisite intent, (2) trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner, (3) trial counsel failed to cross examine the prosecution's firearms identification expert and (4) trial counsel failed to obtain expert assistance. (R & R 45–53.)

inconsistent defenses. Accordingly, Petitioner's objection is **OVERRULED.**

[16] With respect to the claim of ineffectiveness for failure to present intent evidence, the Court finds that neither the claim itself nor the underlying sub-claims, excepting one, have been procedurally defaulted. Petitioner explicitly claimed in the state habeas petition that trial counsel was ineffective for not producing intent evidence. As to the claim of unreasonable advice not to testify, Petitioner clearly raised the issue in the state habeas petition and, additionally, in his motion to dismiss, Respondent addressed the claim on its merits. Finally, in reviewing Respondent's motion to dismiss, the Court finds that the only portion of the argument regarding expert assistance which Respondent claimed was procedurally defaulted was that pertaining to the location of the bullet. Respondent did not argue that the remaining arguments regarding lack of expert assistance were procedurally defaulted, but instead addressed them on the merits. Consequently, the defense of procedural default was waived, *Trest v. Cain*, 522 U.S. 87, ——, 118 S.Ct. 478, 480, 139 L.Ed.2d 444 (1997), and cannot now be raised on objection to the R & R. Accordingly, Petitioner's objection is **SUSTAINED** and Respondent's objection is **OVERRULED.**

2. Trial counsel failed to object to a co-defendant's testimony about his life sentence.

[17] In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 53.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

3. Trial counsel failed to establish Petitioner's parole ineligibility.

The Magistrate Judge determined that trial counsel's failure to establish parole ineligibility by failing to request rescheduling of the trial was procedurally defaulted, but that failure to challenge the determination that Petitioner was not ineligible for parole was not procedurally defaulted because it was related to the *Simmons* claim. (R & R 36.) Respondent objects to the Magistrate Judge's latter determination. Petitioner concedes that neither claim was raised in the state proceedings and further, in light of the fact that the Fourth Circuit vacated *Mackall v. Murray*, 109 F.3d 957 (4th Cir.1997) in *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997) (en banc), does not object to the Magistrate Judge's determinations. Accordingly, Respondent's objection is **SUSTAINED.** Neither argument will be addressed on its merits.

4. Trial counsel failed to conduct adequate voir dire.

On page 37 of the R & R, the Magistrate Judge stated that all the arguments regarding the effectiveness of trial counsel's jury *voir dire* were preserved. Respondent objects to this statement arguing that the Magistrate Judge should have found all claims to be procedurally defaulted, excepting those related to jurors Amelia, Powell, Ross and the questioning of the entire panel regarding mitigating factors. On page 56 of the R & R, the Magistrate Judge stated that because the claims related to jurors Amelia, Powell, Ross and the questioning of the entire pool regarding mitigating factors had been raised during the state proceedings, only those claims would be considered. With the exception of these, the Magistrate Judge declined to address any other jury *voir dire* issues. Accordingly, Respondent's objection is **OVERRULED.** Review of the merits of this claim will be limited to the issues surrounding jurors Amelia, Powell and Ross and the questioning of the entire pool regarding mitigating factors.

5. Trial counsel conceded the sole aggravating factor in the penalty phase.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 58.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

6. Trial counsel failed to adequately prepare for the penalty phase.

This claim encompasses two (2) arguments: trial counsel was ineffective for failing to object to the court-appointed mental health expert and trial counsel was ineffective for failing to present expert mitigating evidence. The Magistrate Judge determined that the former argument was procedurally defaulted, but the latter preserved. (R & R 59.) Petitioner objects raising two arguments. First, Petitioner urges that the Magistrate Judge's conclusion is inconsistent with the previous determination that the ineffectiveness claim was preserved. (R & R 34.) Second, Petitioner claims that Respondent waived procedural default.

The Court finds that the claim is not procedurally defaulted. The ineffective assistance of counsel claim was clearly raised in the state habeas proceeding where Petitioner claimed that trial counsel failed to object to the court-appointment mental health expert who would not work with the defense and failed to put on any expert mitigating testimony. Accordingly, Petitioner's objection is **SUSTAINED.** Both arguments will be addressed on the merits.

D. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 62.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

E. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an *ex parte* showing of need for expert assistance.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 68.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected to the Magistrate Judge's conclusion. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

F. The refusal to allow Petitioner exculpatory statements, the refusal to review such statements *in camera* and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

Neither party objected to the Magistrate Judge's conclusion that, with the exception of the assertion of the right to an *in camera* hearing, this claim was procedurally defaulted. (R & R 31–33.) Accordingly, the Court adopts the findings made by the Magistrate Judge. The preserved claim will be reviewed on the merits.

G. The Virginia death penalty statute on its face and as applied violates the Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that this claim had not been procedurally defaulted. (R & R 37.) Respondent objects arguing that some of the arguments that the Magistrate Judge considered were new arguments which were never presented to the state courts. Turning to Respondent's memorandum in support of his motion to dismiss, the Court finds that Respondent argued that five (5) specific arguments for unconstitutionality were procedurally barred because they were not raised in the state proceedings. They are: (i) that jurors are not informed that a life sentence will be imposed unless the jury recommends death; (ii) that the "vileness" aggravating factor is vague; (iii) that death by legal injection is cruel and unusual; (iv) that the sentencing statute does not require that a death sentence be set

aside if a court finds "good cause;" and (v) that the sentencing statute allows for hearsay in the post-sentence report.

On direct appeal, Petitioner argued (1) that death by electrocution is cruel and unusual and (2) that the Virginia death penalty statute is unconstitutional because "future dangerousness" is not meaningfully defined and no jury instruction is required in consideration of mitigating evidence. In his state habeas petition, Petitioner did not challenge the constitutionality of the death penalty statute. Accordingly, Respondent's objection is **SUSTAINED.** Those particular arguments will not be considered by this Court, but any remaining arguments will be evaluated on their merits.

H. Petitioner was denied his right to confrontation in violation of the Sixth amendment.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 85.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

I. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

The Magistrate Judge determined that this claim was not procedurally defaulted because it had been raised both on direct appeal and in the state habeas proceedings. (R & R 37.) Respondent objects arguing that the claim that trial counsel was inadequate for failing to object to the admission of unadjudicated conduct without a burden of proof instruction is a new claim which was not presented to the state courts.

The Court finds that the claim is not procedurally defaulted because it was clearly raised before the state courts. On direct appeal, Petitioner claimed that the trial court erred in failing to proffer to the jury an instruction which stated a burden of proof for consideration of unadjudicated misconduct. In the state habeas proceeding, Petitioner claimed that trial counsel was ineffective for failing to object to the admission of evidence of prior unadjudicated misconduct. Further, habeas counsel alleged that the trial court erred in permitting evidence of unadjudicated prior misconduct even without an objection to such evidence. Accordingly, Respondent's objection is **OVERRULED.**

J. The Virginia Supreme Court failed to perform an adequate review of Petitioner's death sentence for proportionality and for passion, prejudice or other arbitrary factors.

[18] The Magistrate Judge determined that the issue of the sufficiency of the Virginia Supreme Court's proportionality review was procedurally defaulted, but that the issue of whether Petitioner's sentence was imposed under the influence of passion, prejudice or any other arbitrary factor or disproportionate was not procedurally defaulted. (R & R 33, 73.) Petitioner objects to the former conclusion. Respondent objects to the latter.

Va.Code § 17–110.1(C) mandates review of death sentences for proportionality and for passion, prejudice or arbitrariness, in addition to consideration of any errors alleged by a defendant. On direct appeal, Petitioner did not argue that either of these situations applied in his case. On direct review, the Virginia Supreme Court determined that Petitioner's death sentence was neither disproportionate nor influenced by passion, prejudice or arbitrariness. In his initial state habeas petition, Petitioner did not argue that the court had inadequately performed its review for passion, prejudice or arbitrariness, but did argue that the Virginia Supreme Court failed to adequately perform its proportionality review of his death sentence. The Virginia Supreme Court found the latter argument to be procedurally defaulted pursuant to *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, but the court did not explain how and why *Slayton* applied to this claim. Given that the issue of whether the court adequately performed its review for proportionality could not be raised until such a review

was conducted, logic dictates that the claim could not be raised until the state habeas petition was filed. Thus, the reasoning of the Virginia Supreme Court is perplexing. Nevertheless, this Court cannot review the quality of the decision.[8] It is axiomatic that federal courts do not review state decisions based solely upon adequate and independent state law. Accordingly, Petitioner's objection is **OVERRULED.** Because Petitioner did not argue in his federal petition that the death sentence was imposed under passion, prejudice or arbitrariness or that the sentence was disproportionate, the Court finds that the claim is not properly before the Court. Accordingly, Respondent's objection is **SUSTAINED.** Neither argument will be considered on its merits.

K. Virginia's capital murder sentencing statute is unconstitutional.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 77.), thereby implicitly concluding that the claim was not procedurally defaulted. Neither party objected to the Magistrate Judge's conclusion. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

IV. CLAIMS REVIEWED ON THE MERITS

The Anti-terrorism and Effective Death Penalty Act ("AEDPA") is generally applicable to Petitioner's case, because his petition was filed well after April 24, 1996, the enactment date of the Act. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (holding that the new provisions of chapter 153 generally apply to cases filed after the [AEDPA] became effective).[9] The newly amended 28 U.S.C. § 2254(d) establishes the standard of review to be applied by a federal court considering a state prisoner's petition for habeas relief. Section 2254(d) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Both parties object to the standard of review as outlined by the Magistrate Judge. Petitioner objects arguing that in evaluating the Virginia Supreme Court's cursory, "no merit" state habeas ruling, the proper standard of review is *de novo*. Respondent objects to the Magistrate Judge's determination that mixed questions of law and fact (e.g. Petitioner's ineffective assistance of counsel claims) are to be reviewed *de novo*. Respondent argues that, under the AEDPA, state court findings both of fact and of law are subject to deferential review.

[19] Section 2254(d) applies to any claim adjudicated on the merits in state court. Contrary to the argument advanced by Petitioner, a state court decision that summarily dismisses a petitioner's claim as meritless is an adjudication on the merits within the meaning of § 2254(d). *Wright v. Angelone*, 151 F.3d 151, 156, No. 97–32, 1998 WL 394990, at *4 (4th Cir. July 16, 1998); *Hen-*

8. Even if the Court did not find the claim procedurally defaulted, the Court finds no merit in this claim. The Fourth Circuit previously addressed the identical claim, holding that such a claim does "not provide sufficient constitutional grounds to warrant a writ of habeas corpus." *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996).

9. The specific provision of § 107 of the AEDPA, however, is not applicable. Although § 107 contains several provisions pertaining specifically to capital defendants, these provisions are applicable only if the state meets the "opt-in" requirements set forth in § 107. Virginia does not meet the qualifications of § 107, (Mem. Op. and Order, Dec. 6, 1996.), thus precluding its applicability to this case.

non v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997); *see also Parker v. Angelone*, 959 F.Supp. 319, 320 (E.D.Va.1997) (decision by state court summarily dismissing petitioner's claim as "frivolous" is an "adjudication on the merits"); *McLee v. Angelone*, 967 F.Supp. 152 (E.D.Va.1997) (holding that § 2254(d) does not require an explanatory decision from the state court).

Nevertheless, the practical significance of the § 2254(d) new standard of review is lessened in cases where the state court offers no explanation for its decision. *See Cardwell v. Netherland*, 971 F.Supp. 997, 1015 (E.D.Va. 1997). In cases where there is no indication of *how* the state court came to its decision, it will obviously be more difficult for the federal court to determine whether the state court's ultimate determination involved an unreasonable application of federal law. As explained by the Court of Appeals for the Seventh Circuit:

> [O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review. That is just realism. It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case.

Hennon, 109 F.3d at 335.

If there is a qualifying state decision on the merits, the writ shall not be issued unless one of the statutory exceptions is met. Section 2254(d)(1) governs the standard of review for legal claims. A federal court may grant a petition if it finds that the state decision was contrary to clearly established federal law, or involved an unreasonable application of clearly established federal law. This section abrogates the *de novo* review that was required under *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).[10] However, the review of legal claims is still *de novo* in the sense that federal courts must independently determine whether the state court decision is correct under federal law. The AEDPA does not require any state decision to be upheld where the decision is "contrary to" or is "an unreasonable application of" federal law. Thus, the Act does not eliminate the power of the federal judiciary to determine what the law is, as required by Article III of the United States Constitution. The AEDPA did, however, alter habeas review by mandating a strict choice-of-law rule. In comparing the state decision to clearly established federal law, it is the law "as determined by the Supreme Court of the United States" that prevails. Federal courts are no longer permitted to rely on their own jurisprudence in addition to that of the Supreme Court. Thus, Petitioner must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. *See Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir.1996).

In *Green v. French*, 143 F.3d 865 (4th Cir.1998), the Fourth Circuit interpreted the meaning of "contrary to" and "unreasonable application of."

> [A] decision is "contrary to" precedent only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue.

Id.

> [A] decision represents an "unreasonable application of" precedent only when that decision applies a precedent in a context different from the one in which the precedent was decided and one to which extension of the legal principle of the precedent is not reasonable, when that decision fails to apply the principle of a precedent in a context where such failure is unreasonable, or when that decision recognizes the correct principle from the higher court's precedent, but unreasonably applies that principle to the facts before it (assuming the facts are insufficiently different from those that give rise to the precedent as to constitute a new context for consideration of the principle's applicability).

Id.

Section 2254(d)(2) dictates the standard of review applicable to claims based on pure questions of fact. When a petition for habeas relief is based on a challenge to a factual determination, before granting an application for a writ, the federal court must find that the state decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d)(2). In addition, factual determinations made by a State court shall be presumed to be correct and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth amendments (The *Simmons* claim).

The Magistrate Judge recommended that Petitioner's case be remanded for resentencing on the basis that, on remand from the United States Supreme Court, the Virginia Supreme Court's decision, *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360, limited the application of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, in a manner inconsistent with the language in *Simmons*, required an inconsistent treatment of two separate convictions of Petitioner, and contradicted more than one hundred years of Virginia law that says a conviction occurs when the jury renders the verdict. (R & R 113.) Respondent objects claiming that the Magistrate Judge clearly erred in recommending that the writ be granted on the basis of an error in state law. *See* 28 U.S.C. § 2254(d)(1). Petitioner does not object to the Magistrate Judge's recommendation, but expresses two (2) issues of concern.[11] First, Petitioner notes that, to the extent that Virginia state law was interpreted, the Magistrate Judge's decision was appropriate because the Virginia Supreme Court's decision was "so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *See Richmond v. Lewis*, 506 U.S. 40, 50, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992). Second, Petitioner clarifies that the right to inform the jury of his parole ineligibility status stemmed from both the Eighth Amendment and the Fourteenth Amendment.

The Court finds that the judgment of the Virginia Supreme Court resulted in a decision that is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and involved an "unreasonable application" of *Simmons* as determined by the Supreme Court of the United States. Accordingly, Respondent's objection is **OVERRULED.** For the following reasons, the application for a writ of habeas corpus is GRANTED and Petitioner's case remanded to the Circuit Court for Fairfax County for resentencing.

1. Simmons v. South Carolina

Simmons represents the most recent in a series of cases incrementally refining the process of applying the death penalty by expanding, first, the sentencer's knowledge, and second, an accused's right to respond to arguments advanced by the sovereign in support of the imposition of the death penalty. The theme in all of the cases is dual. First, due process requires that a defendant be permitted to introduce, and the sentencer consider, all relevant evidence that may be viewed in a mitigating light by the sentencer. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Eddings v. Oklahoma*, 455 U.S. 104,

10. Prior to passage of the AEDPA, review was *de novo* in the strictest sense of that term. Under the *Brown v. Allen* line of cases, insofar as petitions presented questions of law or mixed questions of law and fact, federal courts were required to treat the petitions as a wholly new complaint. Federal courts were required to treat state court adjudications in the particular case as nothing more than a potentially relevant authority from the court of last resort of another jurisdiction. *Brown*, 344 U.S. at 458, 73 S.Ct. 397.

11. Petitioner also noted his concern with the Magistrate Judge's determination that the Virginia Supreme Court possessed authority and jurisdiction to calculate Petitioner's parole ineligibility because such an issue is a mixed question of law and fact. The Court, however, has determined that argument to be procedurally defaulted. *See supra* III.G.

102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Second, a defendant must have both access to information upon which the sentencer relies in imposing the death penalty, *see Simmons; Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and the opportunity to rebut the same. *See Simmons; McCleskey; Skipper; Lockett; Gardner.* In addition to these themes, accurate information conveyed by the court, to the sentencer, is constitutionally encouraged, *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1993), without regard to how the information may be received and, in the context of the ability of a defendant, necessarily, to be able to respond.

In *Simmons*, the defendant was convicted of the murder of an elderly woman. The state relied solely on "future dangerousness" as the basis upon which the jury should consider whether the defendant should be sentenced to death or given life imprisonment as punishment for his crimes. *Simmons*, 512 U.S. at 157, 114 S.Ct. 2187. The petitioner, however, presented evidence that his future dangerousness was limited to elderly women and, therefore, the jury would have no reason to expect violent acts from him in prison. *Id.* at 158, 114 S.Ct. 2187. Further, the petitioner requested that the court instruct the jury that, in his case, "life imprisonment" did not permit parole. *Id.* "To buttress his request, [the] petitioner proffered, outside the presence of the jury, evidence conclusively establishing his parole ineligibility," *id.*, and, additionally, Petitioner presented evidence that (1) jurors believe a convicted murderer sentenced to "life imprisonment" will eventually be released from prison and (2) jurors indicate that the amount of time a convicted murderer would actually spend in prison is an important factor in choosing between life and death. *Id.* at 159, 114 S.Ct. 2187.

The trial court, however, denied the petitioner's request for an instruction regarding parole ineligibility. Further, the court denied a request for an instruction which indicated that the petitioner would remain in jail for the balance of his natural life. *Id.* at 159–60, 114 S.Ct. 2187.

During deliberations in the sentencing phase of the case, the jury asked whether life imprisonment carried with it the possibility of parole. *Id.* at 160, 114 S.Ct. 2187. The court instructed the jury not to consider parole in reaching its verdict and further said, "the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning." *Id.* Twenty-five minutes later, the jury returned with the sentence of death. *Id.*

The issue before the United States Supreme Court was whether the jury was entitled to know that the petitioner was ineligible for parole. In a seven to two opinion, the Court concluded that the jury was so entitled. Justice Blackmun, writing for the plurality, stated:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

Id. at 163–64, 114 S.Ct. 2187. The opinion further stated: "[T]he jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested." *Id.* at 165–66, 114 S.Ct. 2187.

Justice O'Connor, in an opinion concurring in the judgment and joined by Chief Justice Rehnquist and Justice Kennedy, stated:

> When the state seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id. at 177, 114 S.Ct. 2187.

2. "Unreasonable determination of the facts"

[20] In this case, on January 29, 1993, at the time of the jury's question, Petitioner had been tried and convicted by another jury of two counts of robbery and two counts of use of a firearm in the commission of a robbery at a Pizza Hut. Pursuant to that jury's recommendation, the court had imposed a sentence of seventy-six years. (1/29/93 Tr. at 133.) Additionally, on January 29, 1993, Petitioner had been tried and convicted of two counts of robbery and one count of the use of a firearm at a Domino's Pizza. That jury had recommended a sentence of eighteen years, but the court had not yet imposed the sentence.[12] (1/29/93 Tr. at 134.)

In its decision, the Virginia Supreme Court relied upon section 53.1–151(B1) of the Virginia Code, the statutory language establishing parole ineligibility in the event of three convictions for defined offenses. Section 53.1–151(B1) of the Virginia Code states, in part,

> Any person convicted of three separate felony offenses of (I) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (I), (ii), or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

The court found that on the day of trial, when the jury asked the question of whether there was "a possibility of parole at some time before his natural death," Petitioner had only two qualifying convictions—the Pizza Hut robbery, for which he had already been sentenced to seventy-six years, and the robbery of the 7–11 and murder of Kayani, the very offenses before the trial court for resolution. The court concluded that the Domino's Pizza conviction did not qualify under 53.1–151(B1) because even though the jury recommended that Petitioner serve eighteen years, that sentence was, in fact, not imposed until February 18, 1993, two and one-half weeks after conclusion of the death sentence trial. *Ramdass*, 450 S.E.2d at 361.

An obvious question arises from the court's reasoning: If the Domino's Pizza conviction did not constitute a conviction for purposes of ineligibility for parole (because the court had not yet imposed a sentence), how then could Petitioner's immediate offenses for which the jury was determining the sentence (and therefore judgment had not been entered on the verdict) constitute a second predicate conviction? The Court finds no logical reason for the exclusion of the Domino's Pizza robbery conviction as a third conviction of Petitioner. From the record of the state court proceedings, the Court finds that the procedural posture of the Domino's Pizza conviction is factually indistinguishable from the procedural posture of the immediate offense. Accordingly, the Court finds that in light of the record before it, the Virginia Supreme Court made an unreasonable determination of the facts when applying the law to determine whether Petitioner was parole eligible.

3. Unreasonable Application of Simmons

[21] In the course of deliberating on Petitioner's punishment, the jury sent the follow-

12. The sentence was imposed on February 18, 1993, after conclusion of the trial which is the subject matter of this appeal, but before actual imposition of the punishment by the trial court. Moreover, on February 18, 1993, Petitioner also entered a plea and was convicted of the robbery of the Bragg Towers Hotel. The record does not indicate what disposition was made for the robbery of a cab driver.

ing question into the court: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" (1/29/93 Tr. at 278.) At the time of Petitioner's trial, Virginia law precluded informing a jury, even in response to a request for information, about a defendant's parole status and whether defendant was parole eligible. *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (Va.1992).

The Commonwealth's immediate response to the jury's question was to advise the court of the language of the Model Jury Instruction 2.7000 which stated: "you are to decide what a just punishment is and not to concern yourself with what happens thereafter." (1/29/93 Tr. at 278.) In response thereto, Petitioner's counsel made the following statements:

> MR. PIOTROWSKI: Your Honor, obviously I don't think that that answer is sufficient for the circumstances. I'm trying to suggest the wording and I anticipated this question and I hoped to have it written out for you, I don't, I'm trying to formulate it in my mind right now.
>
> I believe that the Court [sic] should be told that they can not concern themselves with what will occur after they impose their sentence.
>
> I feel, however, Your Honor, though that the question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time.
>
> I'm looking for some kind of language that would balance out that perception. A suggestion that I have here in front of me is—I wrote as we talked, is that "You must not concern yourself with matters that will occur after you impose your sentence, but you may impose that your sentence will be the legal sentence imposed in the case."
>
> I'm open to any other suggestions.

(1/29/93 Tr. at 278–79.)

The court responded by quoting the Virginia Model Jury Instruction and stating to defense counsel that "that's what the law is; isn't it, Mr. Piotrowski?" (*Id.* at 279.) In response, defense counsel acknowledged that such an instruction had been given in the past, but further responded: "I think a situation like this, when you're talking about a death case, when the issue's this crucial, that something more than that is necessary because their concern is parole which they aren't allowed to be told about." (1/29/93 Tr. at 280.) The court sustained the Commonwealth's objection [13] and informed the jury that they should impose what they felt was a fair and just sentence and not concern themselves with the consequences. The jury responded by recommending that Petitioner be sentenced to death. (*Id.* at 281.)

On direct appeal, Petitioner argued that the trial court committed error in refusing to respond to the jury question in a way that would make the jury aware that he would be ineligible for parole upon his conviction of capital murder, in derogation of the Eighth and Fourteenth Amendments to the United States Constitution. The assignment of error was rejected on direct appeal. *Ramdass*, 450 S.E.2d at 361.

In a petition seeking a writ of *certiorari* from the United States Supreme Court, the issue was raised in the context of the court's refusal to inform the jury of Petitioner's parole status. That petition for *certiorari* was granted. On remand, the sole issue before the Virginia Supreme Court was "whether the Due Process Clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." (App. Brief at ii, Appeal to Va. S.Ct. No. 930693.)

The matter was resolved in a brief opinion issued November 4, 1994, in which the Virginia Supreme Court, in perfunctory fashion, decided that *Simmons* was not an issue because Petitioner was not parole ineligible on January 29, 1993. *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (1994).

13. At this point, trial counsel was not obligated to offer or argue for a specific instruction contrary to controlling Virginia law, and counsel was not constitutionally defective for failing to anticipate a new rule of law. *United States v. McNamara*, 74 F.3d 514 (4th Cir.1996).

Writing for the court, Justice Whiting stated, in pertinent part:

> At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1–151(B1). They were:
>
> (1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1–151(B1).
>
> (2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1–151(B1).
>
> We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1–151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592–93, 113 S.E. 707, 709 (1922)(jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence.

Id. at 361.

Petitioner's case is not unlike the *Simmons* case. In both, the prosecution relied solely upon the "future dangerousness" prong of the statutory standard to establish the necessity of imposition of the death penalty. In both, the juries explicitly asked whether the defendant would be paroled if sentenced to life imprisonment. In both, the trial court gave obtuse answers that left the juries to speculate about the meaning of life imprisonment and the probability of the accused being released from incarceration. Under these parallel circumstances, the United States Supreme Court determined that evidence of parole ineligibility is clearly relevant to rebut future dangerousness. Nevertheless, the Virginia Supreme Court determined that *Simmons* did not apply to Petitioner's case because, in the court's estimation, Petitioner was not parole ineligible. The Virginia Supreme Court made this determination, despite the obviously illogical factual basis upon which it was determined that Petitioner was parole eligible and despite the United States Supreme Court's admonition that juries should not be left to speculate about parole eligibility versus life imprisonment. This, the Court finds to be an unreasonable application of *Simmons*.

Moreover, by concluding that Petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment, the Virginia Supreme Court evaded the full import of *Simmons*. Even assuming the definition of "conviction" was properly determined by the Virginia Supreme Court, the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole. That is, everyone was aware that, at the time of the capital sentencing phase, Petitioner had either plead guilty or been found guilty by a jury of at least three qualifying felony offenses under Virginia Code Section 53.1–151(B). Indeed, these offenses were relied upon to establish Petitioner's future dangerousness. The jury could have been informed, with all confidence, that Petitioner would never be released from prison, thereby rebutting the notion that he presented a future danger to society. Nevertheless, by the Virginia Supreme Court concluding that Petitioner was parole eligible and that therefore the trial court's answer to the jury's question was acceptable, the Commonwealth of Virginia "succeed[ed] in securing a death sentence on the ground of future dangerousness while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment [for Petitioner] means without parole." *Simmons*, 512 U.S. at 162, 114 S.Ct. 2187.

4. Conclusion

For the aforementioned reasons, the Court finds that the judgment of the Virginia Su-

preme Court resulted in a decision that is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and involved an "unreasonable application" of *Simmons* as determined by the Supreme Court of the United States. Accordingly, Respondent's objection is **OVERRULED**, and Petitioner's case is **REMANDED** to the Circuit Court of Fairfax County for resentencing.

B. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

Petitioner asserts numerous claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a litigant must prove both: "(1) deficient performance and (2) prejudice." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove deficient performance, a litigant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. That is, a litigant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. To prove prejudice, the litigant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. Failure to meet either prong defeats a litigant's ineffective assistance of counsel claim. *Id.* at 700, 104 S.Ct. 2052. A court need not address both components of the test if the litigant makes an insufficient showing on one part of the test. *Id.* at 697, 104 S.Ct. 2052.

1. Trial counsel's trial strategy was non-existent or internally inconsistent.

This claim consists of two parts: the procedurally defaulted claim of ineffectiveness for presentation of inconsistent defenses [14] and the preserved claim of ineffectiveness for failure to produce intent evidence. Only the latter will be addressed here. Petitioner's claim that his trial counsel was ineffective for failing to produce intent evidence is comprised of four (4) underlying claims: (I) Petitioner was unreasonably advised not to testify, thereby failing to confront the prosecution's argument that the gun was fired twice and in an upward position; (ii) trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner; (iii) trial counsel failed to cross examine the prosecution's firearms identification expert; and (iv) trial counsel failed to obtain an expert who would help them present their theory of the case. Characterizing these claims as "Monday-morning quarterbacking," the Magistrate Judge concluded that each of the claims was without merit.

[22] With respect to the first and second sub-issues, Petitioner objects arguing that the Magistrate Judge failed to consider the affidavits of trial counsel wherein it was stated that these trial strategy choices were unreasonable and highly prejudicial. Even assuming Petitioner was prejudiced by not testifying, it is not deficient performance to advise one's client not to testify. *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir.1983). Therefore, the first prong is not satisfied because the performance did not fall below the objective standard of reasonableness.

[23] With respect to the third sub-issue, Petitioner objects arguing that the firearms identification expert was never qualified as a "ballistics expert," yet he testified about ballistics matters, and, further, that trial counsel admits in his affidavit that he failed to interview the expert and erroneously allowed him to testify outside his qualifications, thereby substantially proving the prosecution's case. Upon review, the Court finds that the Magistrate Judge's reasoning on these issues is proper. (R & R 45–53.) Neither the Court's nor trial counsel's hindsight is a basis upon which to find that an unsuccessful trial tactic constitutes deficient performance. *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir.1995).

14. If the claim were not procedurally defaulted, the claim is nonmeritorious. *See Brown v. Dixon*, 891 F.2d 490 (4th Cir.1989).

With respect to the last sub-issue, Petitioner had two objections. First, he argued that it is improper to deny expert assistance yet rely on the absence of expert evidence to defeat a claim. And second, he contended that despite the Magistrate Judge's statement that testimony was undisputed on the issue of whether the gun was twice fired, Petitioner's own testimony in the penalty phase rebutted such evidence. The Court has already determined that the decision not to have Petitioner testify in the guilt phase regarding his intent was not deficient performance. The fact that Petitioner testified in the sentencing phase does not vitiate the undisputed nature of the evidence offered in the guilt phase that the trigger was pulled two times. Accordingly, Petitioner's objection is **OVERRULED**. This claim lacks merit.

2. Trial counsel failed to object to co-defendant's testimony about his life sentence.

[24] Citing *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (Va.1979), the Magistrate Judge determined that it was not ineffective assistance to permit co-defendant Singh to testify regarding his life sentence. (R & R 53–54.) *Coppola* held that a defendant is not entitled to offer evidence that an equally culpable co-defendant had received sentence of life instead of a death sentence. *Id.* Petitioner objects arguing that the Magistrate Judge's reliance on *Coppola* is erroneous because Singh was not the triggerman and, therefore, could not have been sentenced to the death penalty. Petitioner is correct that Singh was not eligible for the death penalty. Va.Code § 18.2–18. Nevertheless, whether such testimony prejudiced the jury is highly speculative. Without a modicum of proof, Petitioner claims that without the testimony there is a "reasonable probability that the jury would not have felt obligated to impose a harsher sentence" on Petitioner. Accordingly, Petitioner's objection is **OVERRULED**.

3. Trial counsel failed to conduct adequate voir dire.

With respect to Ross, Powell and Amelia, the Magistrate Judge concluded that trial counsel were not ineffective because (1) they challenged Ross and Powell but the trial judge overruled the challenges, (2) Powell was struck with a peremptory challenge, (3) Ross was the alternate and excused prior to deliberations and (4) Amelia was not selected to serve. (R & R 56.) Petitioner objects claiming that these jurors were legally unqualified to serve and, thus he was entitled either to have them stricken by the trial judge or to receive additional peremptory strikes. The Court finds that the trial judge was within his discretion to deny the challenges, *Maynard v. Dixon*, 943 F.2d 407 (4th Cir.1991), and that even if trial counsel had requested additional peremptory strikes (which they did not), there is no evidence that a biased jury was impaneled, *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Accordingly, Petitioner's objection is **OVERRULED**.

With respect to Petitioner's claim that trial counsel failed to adequately *voir dire* all the jurors on whether they would consider mitigating factors, the Magistrate Judge mentioned only that the Virginia Supreme Court had denied the claim on the merits. (R & R 56.) Petitioner objects claiming that the fact that some of the jurors indicated that they would not consider age or education to be mitigating factors raises a strong inference that other jurors also would not and, therefore, Petitioner is entitled to an evidentiary hearing in order to present such evidence. The Court finds that the claim is nonmeritorious. The transcript reveals that many, if not all, of the jurors were asked if they could consider age and/or education as mitigating factors and, additionally, if they could follow the trial court's instructions regarding mitigating factors. (Tr. 1/26/98 111–13, 118–19, 134, 139, 142–43, 170–71, 185, 188, 193, 221–22, 238.) All indicated that they could follow the court's instructions, even if contrary to their personal opinions. For those few not asked the above questions, counsel made an unchallengeable tactical choice not to inquire. Accordingly, Petitioner's objection is **OVERRULED**.

4. Trial counsel conceded the sole aggravating factor in the penalty phase.

[25] During sentencing, trial counsel stated in his opening that Petitioner was a bad

man and might commit crimes in the future. Petitioner argues that these statements effectively conceded future dangerousness; therefore, trial counsel was ineffective. The Magistrate Judge determined that, pursuant to *Clozza v. Murray*, 913 F.2d 1092, 1098 (4th Cir.1990), the statements did not constitute ineffective assistance of counsel because they were consistent with maintaining credibility with the jury. Petitioner objects arguing that *Clozza* holds that concessions are acceptable only in some cases and that this is not such a case because trial counsel conceded the very element the prosecution was required to prove beyond a reasonable doubt. The Court finds that trial counsel's statements do not constitute deficient performance. Trial counsel's theory was that no one could know whether Petitioner might commit crimes if he was on the street, but that Petitioner did not represent a future danger to society because he would spend the rest of his natural life in jail for the string of crimes for which he had been convicted. The allegedly improper statements are consistent with that theory and do not constitute deficient performance. Accordingly, Petitioner's objection is **OVERRULED.**

5. Trial counsel failed to adequately prepare for the penalty phase.

[26] The Magistrate Judge determined that this claim consisted of two arguments: claims regarding the trial court's appointment of a mental health expert and other miscellaneous claims. For the reasons stated by the Magistrate Judge, (R & R 59–62.), the Court rejects the miscellaneous arguments regarding inadequate preparation. Trial counsel presented evidence of Petitioner's dysfunctional childhood through testimony by Petitioner, Petitioner's brother and mother and a probation officer who had worked with Petitioner. Although reasonable counsel may have chosen to present such evidence in a different manner, trial counsel's choice does not constitute deficient performance.

[27] With respect to the mental health expert, Petitioner objects to the Magistrate Judge's conclusion, arguing that trial counsel was ineffective for not researching the appointed mental-health expert's background, thereby learning of his allegedly pro-prosecution bias, and for not objecting to the trial court's selection. Even assuming that counsel was deficient in not objecting to the court-appointed expert, the Court finds that Petitioner was not prejudiced. Under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), an indigent defendant is entitled to the appointment of a mental health expert when his legal sanity is likely to be a significant issue at trial. Va.Code. § 19.2–264.3:1 provides in pertinent part:

> Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

The court-appointed expert neither found that Petitioner's sanity was at issue nor determined that Petitioner's history or character was a mitigating factor. Evidence regarding Petitioner's history and character, however, was presented through Petitioner, his mother and brother, and a probation officer. Further, Petitioner's repeated involvement in the criminal justice system had resulted in several mental evaluations which were consistent with each other. Evidence of these evaluations was presented through the probation officer. Finally, at no time has a mental evaluation of Petitioner revealed evidence that Petitioner was (or is) operating under a mental disease or defect which would

render him unaccountable for his behavior. Accordingly, the Court finds that Petitioner was not prejudiced by any failure to object to the court-appointed expert or obtain an independent mental health evaluation. Accordingly, Petitioner's objection is **OVERRULED.**

C. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that the trial court was within its discretion in denying the requests for a medical doctor and expert investigator. (R & R 63.) Petitioner objects to the finding as to the medical expert. Petitioner argues that the trial court's denial of a medical expert on the grounds that "no medical evidence had been presented was an exercise in pretzel logic." The Court finds that the trial judge's decision was not unreasonable in light of the lack of evidence Petitioner presented to justify his need for medical evaluation. Accordingly, Petitioner's objection is **OVERRULED.**

D. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an *ex parte* showing of need for expert assistance.

[28] The Magistrate Judge determined that this claim was without merit because there was no constitutional entitlement to *ex parte* hearings on requests for the appointment of experts, and, if there is, such right would constitute a new rule that was not in place at the time of Petitioner's trial. (R & R 68.) Petitioner objects arguing that the requirement of an *ex parte* proceeding is firmly established by both the Supreme Court and the lower courts.

Under federal criminal procedure, when a defendant requests expert assistance, there is clearly a statutory right to an *ex parte* hearing. 18 U.S.C. § 3006A(e)(1). The appropriateness of conducting *ex parte* hearings is obvious: a defendant should not be forced to disclose its evidence and strategy to the prosecution. In *Ake*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, the United States Supreme Court recognized the need for an *ex parte* hearing, but did not hold that such a hearing is constitutionally required. Consequently, the adoption of such a rule at this point in Petitioner's case would be a new rule which, generally, should not be created on collateral review. *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). Accordingly, the objection is **OVERRULED.**

E. The trial court's refusal to allow Petitioner exculpatory statements, the trial court's refusal to review such statements *in camera* and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

Neither party objected to the Magistrate Judge's determination of this claim. Accordingly, the Court adopts the Magistrate Judge's rationale, (R & R 70–73.), which is reiterated herein in pertinent part. For the following reasons, the Court finds this claim to be nonmeritorious.

[29] Petitioner's claim has three components. The first is the denial of polygraph results which trial counsel sought to use for impeachment purposes. The second component consists of statements made to the police by Petitioner's co-defendants and other prospective witnesses, including inculpatory and inconsistent statements made by co-defendants. The third is the trial court's refusal to conduct an *in camera* review. With respect to the first claim, polygraph material is inadmissible under Virginia law, *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159, 167 (1986). Moreover, failure to disclose polygraph results does not deprive a defendant of "material" evidence under the *Brady* rule when the polygraphs results are inadmissible, even for impeachment purposes, as in the Commonwealth of Virginia. *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995).

[30] With respect to the second claim, in order for a *Brady* violation to occur, the material sought must be "material." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is "materi-

al" under *Brady* "only where there exists a 'reasonable probability'" that had the evidence been disclosed the result at trial would have been different. *Wood*, 516 U.S. at 5, 116 S.Ct. 7. A "reasonable probability" that the result would have been different is shown when the actions of the government "undermine[ ] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Here, counsel has not demonstrated that the withheld material undermines the confidence in the outcome of this trial.[15]

With respect to the third claim, the trial court did not commit error by refusing to examine the prosecution's file *in camera* to determine the presence of exculpatory material. In *Rowe v. Grizzard*, 591 F.Supp. 389 (E.D.Va.1984), similar to this case, defense counsel asked for "statements made by co-defendants and witnesses which either contradicted others' statements and/or were internally inconsistent." *Id.* at 398. The trial court refused, noting the prosecution's burden to comply with *Brady*. *Id.* In denying the federal habeas petition, the district court stated: "Absent a more specific request than was made, the trial court is not required to make an *in camera* inspection of the prosecution's entire file." *Id.*

F. The Virginia death penalty statutes on their face, and as applied, violate the Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that this claim is nonmeritorious. (R & R 77–85.) Petitioner generally objects without pointing to specific errors in the Magistrate Judge's reasoning. The Court finds that the claim is nonmeritorious. The Fourth Circuit has denied claims similar to Plaintiff's preserved claims regarding jury consideration of mitigation evidence and consideration of unadjudicated misconduct. *See Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995); *Tuggle v. Thompson*, 57 F.3d 1356, 1362 (4th Cir.1995). Accordingly, Petitioner's objection is **OVERRULED.**

G. Petitioner was denied his right to confrontation in violation of the sixth amendment.

[31] Petitioner claims that he was denied the right of confrontation in the course of cross-examining co-defendant Ramirez because the trial court sustained prosecution objections to defense questions concerning Ramirez' character and the location of fingerprints at the crime scene. The Magistrate Judge determined that the claim was nonmeritorious because only issues of state criminal procedure and evidence were challenged and such issues did not rise to a constitutional level. (R & R 85–86.) Petitioner objects arguing that the wholesale sustaining of objections prevented adequate cross examination on Ramirez' character and propensity for criminal conduct, thereby affecting the jury's verdict(s) with respect to guilt and/or sentencing.

No litigant, including a death penalty defendant, has the unlimited right to conduct an examination of any witness called to the stand. The judgment of the trial court in denying certain questions it found to be prejudicial or irrelevant was clearly within the province of the trial court and was upheld on appeal by the Virginia Supreme Court. As the United States Supreme Court noted in *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), a federal court's habeas review is not intended to address issues of state criminal procedure and evidence. Accordingly, Petitioner's objection is **OVERRULED.**

H. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

The Magistrate Judge determined that Virginia law permits the use of unadjudicated

15. Moreover, *Brady* requires only that the government disclose evidence not available to the defense from other sources either directly or through diligent investigation. *Barnes v. Thompson*, 58 F.3d 971, 975 n. 4 (4th Cir.1995); *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir.1994); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir.1990). Petitioner has not asserted that he had no other means of obtaining the material which was withheld.

criminal conduct in the sentencing phase. (R & R 86.) Citing *Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), Petitioner objects arguing that the federal constitution requires that the prosecution prove by a preponderance of the evidence that the defendant committed the unadjudicated conduct. In *Nichols*, the Supreme Court held that the federal due process clause requires in a non-capital, federal action that previous conduct being used to enhance a sentence be proved by a preponderance of the evidence. *Id.* 114 S.Ct. at 1928.

[32] The Court finds that Petitioner's argument, if accepted, would create a new rule which was not in effect at the time his conviction became final. *Saffle*, 494 U.S. at 488, 110 S.Ct. 1257. The United States Supreme Court has repeatedly refused to determine the issue of whether unadjudicated criminal conduct can be introduced in the sentencing phase of a capital trial.[16] At the time of Petitioner's trial, Virginia statutory law permitted the introduction of such evidence when certain notice requirements are met. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422, 435 (Va.1985); *see also Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995). Virginia law, however, did not require that the prosecution prove the conduct by any standard. *See Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342 (Va.1987). Because federal courts generally do not create new rules or apply new constitutional rights on collateral review, *Saffle*, 494 U.S. at 488, 110 S.Ct. 1257, Petitioner's claim must fail. Accordingly, Petitioner's objection is **OVERRULED.**

I. Virginia's capital murder sentencing statute is unconstitutional.

[33] The Magistrate Judge determined that this claim is nonmeritorious. (R & R 77–85.) Petitioner generally objects without pointing to specific errors in the Magistrate Judge's reasoning. The Court finds that the claim is nonmeritorious as the statute is not unconstitutionally vague. The Fourth Circuit has denied Plaintiff's preserved claims that the "future dangerousness" prong of the Virginia capital sentencing statute is unconstitutional on that ground. *See Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995) (finding that "future dangerousness" may be determined using unadjudicated misconduct); *Tuggle v. Thompson*, 57 F.3d 1356, 1362 (4th Cir.1995) (stating that Virginia is a "non-weighing" state, i.e. its statutory scheme narrows the class of persons eligible for death penalty and a weighing instruction is not required by the federal Constitution); *Spencer v. Murray*, 5 F.3d 758 (4th Cir.1993) (finding that "future dangerousness" prong is not vague). Accordingly, Petitioner's objection is **OVERRULED.**

V. REQUEST FOR EVIDENTIARY HEARING

Whether an evidentiary hearing is required is determined in light of the petition, the answer, the transcript and record of state court proceedings, and any expanded record evidence. *See* Rule 8, Rules Governing § 2254 Cases. If a hearing is not required, "the judge shall make such disposition of the petition as justice shall require." The Court finds that the facts presented in the record, transcripts of the state court proceedings, the affidavits of trial counsel and experts, and the arguments presented in the pleadings lead to the conclusion that an evidentiary hearing is not required to address the claims raised by Petitioner. Accordingly, the request for an evidentiary hearing is denied.

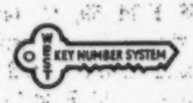
VI. CONCLUSION

The Court, having examined the objections to the Magistrate Judge's R & R, and having reviewed the record and conducted a *de novo* review of those portions objected to, does hereby order that the petition be **GRANTED**

16. In *United States v. Beckford*, 964 F.Supp. 993 (E.D.Va.1997), the court considered the issue of whether unadjudicated criminal conduct is admissible in a federal capital case. It indicated that the states are divided over the issue. As of 1993, six (6) states permit the use of such evidence almost without limitation; ten states require certain procedural safeguards; and eight states absolutely prohibit the introduction of such evidence. *See* Steven Paul Smith, Note, *Unreliable and Prejudicial: the Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 93 Colum.L.Rev. 1249, 1250 (1993).

and that Respondent's motion to dismiss be DENIED. Petitioner's case is REMANDED to the Circuit Court of Fairfax County for re-sentencing in light of the Court's rulings herein.

It is so ORDERED.



David G. LAMB, Plaintiff,

v.

QUALEX, INC., Defendant.

No. Civ.A. 3:98CV413.

United States District Court,
E.D. Virginia,
Richmond Division.

Dec. 16, 1998.

Former employee with depression brought action against former employer alleging violations of the Americans with Disabilities Act (ADA). Employer moved for summary judgment. The District Court, Richard L. Williams, Senior District Judge, held that: (1) employee was judicially estopped from claiming to be a qualified individual with a disability under ADA, and (2) employer was not liable to employee under ADA.

Motion granted.

1. Estoppel ⇐68(2)

"Judicial estoppel" is an equitable doctrine that prevents a party who has successfully taken a position in one proceeding from taking the opposite position in a subsequent proceeding.

See publication Words and Phrases for other judicial constructions and definitions.

2. Estoppel ⇐68(2)

Application of judicial estoppel is appropriate in ADA action when the prior proceeding is a Social Security Administration (SSA) application for disability benefits. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

3. Estoppel ⇐68(2)

Former employee suffering from depression was judicially estopped from claiming to be a qualified individual with a disability under ADA; employee claimed to be a qualified individual with a disability capable of at least part-time work, which was factually incompatible with position he had taken in prior Social Security Administration (SSA) proceeding that he was completely unable to work, his prior position was accepted by SSA, and the two directly contradictory positions were advanced for purpose of gaining unfair advantage in proceedings governed by divergent standards. Americans with Disabilities Act of 1990, §§ 101(8), 102, 42 U.S.C.A. §§ 12111(8), 12112.

4. Civil Rights ⇐173.1

In ADA action, employee bears the burden of demonstrating that he could perform the essential functions of his job. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; 29 C.F.R. § 1630.2(n)(1).

5. Civil Rights ⇐173.1

The ADA requires only that employers adopt accommodations that are reasonable. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

6. Civil Rights ⇐173.1

If employee with disability cannot perform the essential functions of his position with reasonable accommodations, then he is not entitled to relief under the ADA. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

7. Civil Rights ⇐173.1

The ADA does not require that an employer create a position to accommodate a disabled employee. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

8. Civil Rights ⇐173.1

Accommodation of employee with a disability imposes an "undue hardship" on em-

Bobby Lee RAMDASS

v.

COMMONWEALTH of Virginia.

No. 930693.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant was convicted in the Circuit Court, Fairfax County, Quinlan H. Hancock, J., of murder, robbery, and weapons offenses, and was sentenced to death. Defendant appealed. The Supreme Court, 246 Va. 413, 437 S.E.2d 566, affirmed. The United States Supreme Court, 114 S.Ct. 2701, granted certiorari, vacated judgment, and remanded case. On remand, the Virginia Supreme Court, Whiting, J., held that defendant had not yet been convicted of three separate felony offenses at time of penalty phase of capital murder trial and, thus, had not been rendered statutorily ineligible for parole which would have entitled jury to information on defendant's potential for parole for purposes of considering his future dangerousness.

Circuit Court judgment affirmed, and conviction and sentence reinstated.

Homicide ⇐311

Defendant had not yet been convicted of three separate felony offenses at time of penalty phase of capital murder trial and, thus, defendant had not been rendered statutorily ineligible for parole which would have entitled jury to information on defendant's potential for parole for purposes of considering his future dangerousness; jury in another case had found defendant guilty of third felony but judgment had not been entered on that verdict. Code 1950, § 53.1–151, subd. B1.

Michael S. Arif, Burke (Leonard R. Piotrowski; Sharon B. Soloway, Martin, Arif & Soloway, on brief), for appellant.

Katherine P. Baldwin, Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: All the Justices.

WHITING, Justice.

Bobby Lee Ramdass pleaded guilty to the robbery of Mohammad Z. Kayani immediately preceding his trial for the capital murder of Kayani. The capital murder charge was predicated on Ramdass's alleged murder of Kayani in the commission of robbery while armed with a deadly weapon, Code § 18.2–31(4), and the use of a firearm in the commission of Kayani's murder, Code § 18.2–53.1. The trial court deferred action on Ramdass's guilty plea.

In a bifurcated jury trial conducted under the provisions of Code §§ 19.2–264.3 and –264.4, Ramdass was convicted of Kayani's capital murder. In the second phase of the trial, the jury fixed Ramdass's punishment at death, based upon the "future dangerousness" predicate of Code § 19.2–264.2.

Following consideration of a probation officer's report, the court imposed the death sentence fixed by the jury. The court also imposed a life sentence based upon its finding of Ramdass's guilt for Kayani's robbery and imposed the four-year sentence fixed by the jury for the firearms violation. We affirmed those judgments and the sentence to death. *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993).

In a summary disposition, the Supreme Court granted Ramdass's petition for a writ of certiorari on June 20, 1994, vacated the judgment, and remanded the case to this Court "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. ——, 114 S.Ct. 2187 [129 L.Ed.2d 133] (1994)." *Ramdass v. Virginia*, —— U.S. ——, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). Accordingly, by order entered July 29, 1994, we placed this case on our September 1994 docket with directions for appropriate briefing and argument.

We rejected Ramdass's contention in his earlier appeal that the trial court erred in not answering the jury's question, "If the defendant is given life, is there possibility of parole

at some time before his natural death?" *Ramdass*, 246 Va. at 425, 437 S.E.2d at 573. We did so because of our established rule that "a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Id.* at 426, 437 S.E.2d at 573.

In *Simmons*, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant's parole *ineligibility*. *Simmons*, 512 U.S. at ——, 114 S.Ct. at 2198. Hence, *Simmons* applies only if Ramdass was ineligible for parole when the jury was considering his sentence.

Code § 53.1–151(B1) establishes a person's ineligibility for parole as follows:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1–151(B1). They were:

(1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1–151(B1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1–151(B1).

We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1–151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592–93, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence. Therefore, we will reaffirm the trial court's judgment, and reinstate the defendant's conviction and sentence to death.

Affirmed.

KEY NUMBER SYSTEM

Dwayne Allen WRIGHT,

v.

COMMONWEALTH of Virginia.

Record Nos. 920810 and 920811.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant who was 17 years old was tried as adult in the Circuit Court, Fairfax County, J. Howe Brown, J., and convicted of two counts of capital murder, robbery, use of firearm in commission of robbery, and attempted rape. Defendant received death penalty. Appeal was taken. The Supreme Court, 245 Va. 177, 427 S.E.2d 379, affirmed. The United States Supreme Court, 114 S.Ct. 2701, granted certiorari, vacated judgment, and remanded case. On remand, the Supreme Court, Stephenson, J., held that defendant's criminal record did not include convictions of three separate felony incidents of type specified in parole ineligibility statute and, thus, trial court could refuse to inform jury about defendant's potential for parole for purposes of considering his future dangerousness.

No. 93–5044. WRIGHT *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Simmons* v. *South Carolina*, *ante*, p. 154. Reported below: 245 Va. 177, 427 S. E. 2d 379.

No. 93–8309. RAMDASS *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Simmons* v. *South Carolina*, *ante*, p. 154. Reported below: 246 Va. 413, 437 S. E. 2d 566.

Miscellaneous Orders

No. ———. CABAL *v.* I. T., INC.; and
No. ———. THREATT ET AL. *v.* FULTON COUNTY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. ———. DURDEN *v.* UNITED STATES. Motion of Jon M. Hunter for leave to intervene in order to file petition for writ of certiorari denied.

No. ———. DUNKIN ET AL. *v.* LOUISIANA-PACIFIC CORP. ET AL. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. A–955. MORRISON *v.* UNITED STATES. Application for bail, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1379. IN RE DISBARMENT OF FRESCO. Disbarment entered. [For earlier order herein, see 511 U. S. 1016.]

No. D–1410. IN RE DISBARMENT OF VANDER VORT. It is ordered that Wayne A. Vander Vort, of Minneapolis, Minn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1411. IN RE DISBARMENT OF KARSCH. It is ordered that Stephen Elias Karsch, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

ticipated testimony. *Whittaker v. Commonwealth*, 217 Va. 966, 968–69, 234 S.E.2d 79, 81 (1977); *Scott v. Commonwealth*, 191 Va. 73, 78–79, 60 S.E.2d 14, 16 (1950); *Owens v. Commonwealth*, 147 Va. 624, 630–31, 136 S.E. 765, 767 (1927). However, he made no attempt to do so following the trial court's ruling that this type of evidence was inadmissible for purposes of impeaching the witness.

The trial court did not refuse to allow counsel to make a proffer. Rather, when counsel failed to make a proffer and apparently had nothing more to say on the subject, the trial court simply stated, "All right, move on." This statement by the trial court does not constitute a refusal to allow a proffer. The majority's strained interpretation to the contrary creates confusion as to who bears the ultimate responsibility to complete the record for appeal. A standard that requires the trial court to remind counsel to make a proffer suggests a retreat from our long-established rule placing responsibility for the record on counsel.

Since the record before us does not contain the substance of Daniel Sydow's anticipated testimony, and since the substance of that testimony is necessary for review of the error assigned, I would affirm the trial court's judgment.

Bobby Lee RAMDASS,

v.

COMMONWEALTH of Virginia.

Record No. 930693.

Supreme Court of Virginia.

Nov. 5, 1993.

Defendant was convicted in the Circuit Court, Fairfax County, Quinlan H. Hancock, J., of murder, robbery, and weapons offenses, and was sentenced to death. Defendant appealed. The Supreme Court, Whiting, J., held that: (1) defendant failed to establish necessary constitutional materiality to require pretrial production of his accomplices' polygraph test, either for his inspection or for court's in-camera inspection; (2) defendant did not have constitutional right to ex parte hearing on his motion for appointment of medical doctor and private investigator to assist in his defense; (3) defendant was not entitled to immediate adjudication of guilt on robbery charge; (4) refusing to permit defendant to impeach witnesses by questioning their involvement in several unadjudicated crimes did not violate defendant's confrontation rights; and (5) death sentence was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of similar nature.

Affirmed.

1. Indictment and Information ⇐121.1(2)

Trial court did not err in denying defendant's motion for bill of particulars in capital murder trial, where indictment described offenses charged in conformity with statutory requirements. Code 1950, § 19.2–220.

2. Criminal Law ⇐700(3)

Defendant failed to establish necessary constitutional materiality to require pretrial production of his accomplices' polygraph test, either for his inspection or for court's in-camera inspection; although defendant claimed he was denied opportunity to meaningfully cross-examine accomplices and might have been able to impeach their credibility if he had access to test, he failed to show that answers given by accomplices during tests would be favorable to him and material to his guilt or punishment. U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐700(2.1, 4)

Fairness to defendant requires Commonwealth's pretrial production of exculpatory evidence under Due Process Clause of Fourteenth Amendment of the United States Constitution; evidence that impeaches credibility of Commonwealth's witness is exculpatory evidence. U.S.C.A. Const.Amend. 14.

4. Criminal Law ⇐627.5(1), 700(2.1)

There is no general constitutional right to discovery in criminal case, and *Brady* does not establish one. U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐700(2.1)

In order to establish that Commonwealth has violated defendant's *Brady* rights, record must indicate that undisclosed evidence was in fact exculpatory and material either to guilt or punishment. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⇐268.2(3)
Costs ⇐302.3, 302.4
Criminal Law ⇐393(1), 662.1

Indigent defendant did not have constitutional right to ex parte hearing on his motion for appointment of medical doctor and private investigator to assist in his defense in capital murder case; denial of request did not violate defendant's Fifth Amendment right against self-incrimination, his Sixth Amendment right to confrontation, and his Fourteenth Amendment rights to due process, and his rights under Virginia Constitution. U.S.C.A. Const.Amends. 5, 6, 14; Const. Art. 1, §§ 8, 9; 18 U.S.C.A. § 3006A(e).

7. Criminal Law ⇐994(3)

Defendant charged with capital murder, robbery and weapons charges, who pled guilty to robbery on first day of trial, was not entitled to immediate adjudication of guilt on robbery charges, despite defendant's claim that he could have established his ineligibility for parole because of prior convictions; court found defendant guilty of robbery before sentencing phase, and evidence of defendant's parole ineligibility was inadmissible in any event. Code 1950, §§ 19.2–299, 53.1–151, subd. B1; U.S.C.A. Const.Amends. 5, 14.

8. Criminal Law ⇐662.7

Refusing to permit defendant to impeach witnesses by questioning their involvement in several unadjudicated crimes did not violate defendant's confrontation rights under United States and Virginia Constitutions in capital murder case. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 8; Code 1950, § 19.2–269.

9. Criminal Law ⇐778(2), 782(4)

Burden of proof instruction given in capital murder trial, requiring jury to limit its considerations to evidence introduced, did not preclude jurors from using their common sense in deciding whether Commonwealth had carried its burden of proof; instruction relating to jury's duty to weigh the evidence specifically told jurors they were entitled to use their common sense in judging any testimony.

10. Criminal Law ⇐829(21)

Defendant's proposed instruction, including first-degree murder as lesser-included offense of capital murder charge if Commonwealth failed to prove that killing was "willful, deliberate and premeditated," was duplicative of separate finding instructions that court granted in essentially same language as proposed instruction, one dealing with capital murder and the other dealing with first-degree murder.

11. Criminal Law ⇐863(1)

Trial court properly refused to respond to jury's question proposed during sentencing phase of capital murder trial regarding whether there was possibility of parole if defendant was given life sentence; court appropriately responded by telling jury that it should impose such sentence as it felt was just under evidence and within instructions of court and not to concern themselves with what would happen afterwards.

12. Homicide ⇐356

Death sentence imposed on defendant who killed victim during robbery of convenience store was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of similar nature; defendant had long history of criminal activities, including other robberies accompanied by physical violence.

Michael S. Arif, Burke (Sharon B. Soloway, Martin, Arif, DeWilde & Soloway, on brief), for appellant.

Katherine P. Baldwin, Asst. Atty. Gen. (Stephen D. Rosenthal, Atty. Gen., on brief), for appellee.

WHITING, Justice.

In September 1992, Bobby Lee Ramdass was indicted for the murder of Mohammad Z. Kayani in the commission of a robbery while armed with a deadly weapon, the robbery of Kayani, and the use of a firearm during Kayani's murder. Prior to a jury trial, Ramdass pled guilty to the robbery of Kayani and, over Ramdass's objection, the court deferred action on his guilty plea.

Thereafter, in a bifurcated trial conducted under the provisions of Code §§ 19.2–264.3 and –264.4, a jury convicted Ramdass of the capital murder of Kayani and fixed his punishment at death predicated upon a finding of "future dangerousness." The jury also convicted Ramdass of the use of a firearm in the commission of Kayani's murder and fixed his punishment at imprisonment for four years.[1]

After the jury returned its guilty verdicts, the court found Ramdass guilty of Kayani's robbery and referred the robbery and weapon convictions to the district probation officer for a presentence investigation and report. Following the jury's verdict of death in the sentencing phase of the capital murder charge, the court referred the case to the district probation officer for "investigation and report before sentencing." Code § 19.2–264.5. Upon consideration of the probation officer's report covering all three charges, the court sentenced Ramdass to life imprisonment upon the robbery charge and imposed the sentences fixed by the jury on the remaining charges.

Ramdass is before the Court for automatic review of his death sentence, and we have consolidated that review with the appeal from his capital murder conviction. Code § 17–110.1.

FACTS

Because the Commonwealth prevailed in the trial court, we will view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth. *Parks v. Commonwealth*, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980).

During the night of September 1 and early morning of September 2, 1992, Ramdass and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7–Eleven store on Buelah Street in Fairfax County.

Accordingly, near one o'clock on the morning of September 2, the five men entered the 7–Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7–Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.

After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f——— head off."[2] Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.

Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.

1. The jury was authorized to fix a four-year term of imprisonment for the firearm violation because it was Ramdass's second conviction for that offense. Code § 18.2–53.1.

2. Another employee of the 7–Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?" After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."

Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

ISSUES PREVIOUSLY RESOLVED

Ramdass assigns a number of errors and makes arguments that have been answered in previous decisions of this Court. Ramdass does not offer sufficient reasons to justify a modification of our previously expressed views. Therefore, we will reaffirm our earlier decisions and reject Ramdass's contentions as follows:

A. The court's denial of Ramdass's request for appointment of a medical doctor and an investigator at state expense violated his Fourteenth Amendment Due Process and Equal Protection rights. Answered by *O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988); *Townes v. Commonwealth*, 234 Va. 307, 332, 362 S.E.2d 650, 664 (1987), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); *Gray v. Commonwealth*, 233 Va. 313, 329–30, 356 S.E.2d 157, 166, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987).

B. The court's application of Code § 19.2–264.4(C) in the admission of evidence of unadjudicated criminal conduct in the sentencing phase violates the Eighth and Fourteenth Amendments of the United States Constitution. Answered by *Watkins v. Commonwealth*, 238 Va. 341, 351–52, 385 S.E.2d 50, 56–57 (1989), *cert. denied*, 494 U.S. 1074, 110 S.Ct. 1797, 108 L.Ed.2d 798 (1990).

C. The court's admission of evidence of unadjudicated criminal conduct is unconstitutional under any circumstances because of the requirement of a "greater degree of reliability where the death sentence is imposed." Answered by *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, — U.S. —, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993), and *Stockton v. Commonwealth*, 241 Va. 192, 210, 402 S.E.2d 196, 206, *cert. denied* — U.S. —, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991).

D. The court's refusal of Ramdass's proffered jury instruction that required proof of unadjudicated criminal conduct beyond a reasonable doubt violated his due process rights. Answered by *Stockton*, 241 Va. at 210, 402 S.E.2d at 206.

E. The court's denial of Ramdass's motion to declare unconstitutional the provision of Code § 53.1–233 providing for execution of prisoners by electrocution violates the prohibitions against cruel and unusual punishment contained in the United States and Virginia Constitutions. Answered by *Poyner v. Commonwealth*, Order entered in Record Number 930301 on March 10, 1993, and *Boggs v. Commonwealth*, Order entered in Record Number 900967 on July 18, 1990 (both orders rejected same arguments of unconstitutionality that used essentially same background materials relied upon by Ramdass as to execution by electrocution generally and "as carried out in Virginia's electric chair"); *Stockton v. Commonwealth*, 241 Va. at 215, 402 S.E.2d at 209–10; *Martin v. Commonwealth*, 221 Va. 436, 439, 271 S.E.2d 123, 125 (1980); *Hart v. Commonwealth*, 131 Va. 726, 743, 109 S.E. 582, 587 (1921).

ASSIGNMENTS OF ERROR WAIVED

Ramdass did not brief, and has therefore waived, Assignments of Error Numbers Seven, Seventeen, Eighteen, Nineteen, Twenty, and Twenty-four. Rule 5:27(e).

PRETRIAL MOTIONS

Motion for Bill of Particulars

[1] Ramdass filed a motion for a bill of particulars seeking specific details of the evidence in support of the Commonwealth's case. However, the indictment described the offenses charged in conformity with the requirements of Code § 19.2-220 and, therefore, was sufficient to give Ramdass "notice of the nature and character of the offense[s] charged so he [could] make his defense." *Satcher*, 244 Va. at 231, 421 S.E.2d at 828 (quoting *Wilder v. Commonwealth*, 217 Va. 145, 147, 225 S.E.2d 411, 413 (1976)). Under these circumstances, the trial court did not err in denying Ramdass's motion for a bill of particulars.

Motion for Discovery of Accomplices's Polygraph Tests

[2] Ramdass contends that the trial court erred in denying both his motion for discovery of the questions, answers, and results of his accomplices's polygraph examinations and his subsequent oral motion for the court's *in camera* inspection of those tests. According to Ramdass, the Commonwealth was constitutionally required to produce these tests because they may have contained "potentially exculpatory evidence."[3] We do not agree.

[3, 4] Fairness to the defendant requires the Commonwealth's pretrial production of exculpatory evidence under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963). And evidence that impeaches the credibility of a Commonwealth witness is exculpatory evidence. *Robinson v. Commonwealth*, 231 Va. 142, 150, 341 S.E.2d 159, 164 (1986) (citing *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S.Ct. 3375, 3380-81, 87 L.Ed.2d 481 (1985)). However, there is no general constitutional right to discovery in a criminal case, and *Brady* did not establish one. *Lowe v. Commonwealth*, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977)).

[5] In order to establish that the Commonwealth has violated a defendant's *Brady* rights, the record must indicate that the undisclosed evidence was in fact exculpatory and material either to guilt or to punishment. *Lowe*, 218 Va. at 679, 239 S.E.2d at 118. Nothing in this record indicates either that the Commonwealth's Attorney has withheld exculpatory information or that the answers given by Ramdass's accomplices in their polygraph tests would be favorable to him and material to his guilt or punishment.[4] Ramdass's speculation that such statements might contain "potentially exculpatory evidence" imposes neither a duty of disclosure upon the Commonwealth, *id.*, nor a duty of inspection *in camera* by the court. *United States v. Navarro*, 737 F.2d 625, 631-32 (7th Cir.), *cert. denied*, 469 U.S. 1020, 105 S.Ct. 438, 83 L.Ed.2d 364 (1984).

During oral argument, counsel for Ramdass contended that without access to the polygraph examinations the defense could not show that these records contained exculpatory evidence which was material to guilt or punishment. Although a defendant need not make an avowal of *how* a witness might testify in order to obtain pretrial discovery of a witness's statement to police, he should describe the events to which the witness might testify and the relevance of such matters to the crime charged in order to demonstrate its required constitutional materiality to his guilt or punishment. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 871-72, 102 S.Ct. 3440, 3448-49, 73 L.Ed.2d

3. Ramdass concedes correctly that conclusory statements that any of these co-defendants may have been "deceptive" or "flunked" the polygraph examination are not admissible. *Robinson v. Commonwealth*, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986).

4. The Commonwealth's Attorney advised Ramdass's attorney prior to trial that the answers of O'Connor, one of his accomplices, were deceptive in that he attempted to minimize his role in the 7-Eleven incident. The Commonwealth's Attorney also informed Ramdass's attorney of three persons who allegedly would provide an alibi defense, but he also advised that they had made inconsistent statements. We note that Ramdass did not call any of those persons as witnesses.

1193 (1982). Ramdass's only claims of materiality are: (1) that because he was denied access to the polygraph examinations, "meaningful cross-examination" of Singh and Ramirez was "straightjacketed," and (2) that he *might* have been able to impeach their credibility with "any additional information gleaned through investigation of leads created by the polygraph facts." However, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

Considering Ramdass's guilty plea to Kayani's robbery and Singh's uncontradicted testimony that Ramdass shot Kayani, we conclude that Ramdass has not established the necessary constitutional materiality to require the pretrial production of the polygraph tests either for his inspection or for the court's *in camera* inspection. Hence, the trial court did not err in denying Ramdass's discovery motions relating to those tests.

Ramdass's Motion for Ex parte Hearing Relating to Experts

[6] Ramdass, an indigent, maintains that the court erred in denying an *ex parte* hearing of his motion for the appointment of a medical doctor and a private investigator to assist in his defense.[5] Ramdass argues that because he must make "a threshold showing of the significance of the expert's testimony" to obtain such appointments, an *ex parte* hearing is required to avoid a disclosure of his potential defenses to the Commonwealth's Attorney. Accordingly, Ramdass argues, the court's denial of his request violated his Fifth Amendment right against self-incrimination, his Sixth Amendment right to confrontation, his Fourteenth Amendment right to due process, and "Article I Section 8 and 9 of the Virginia Constitution."

However, Ramdass offers no persuasive argument or authority supporting this contention. Indeed, none of the cases he cites deals with the constitutional rights he asserts in this case. Most of those cases deal with the application of a federal statute creating a right to an *ex parte* hearing when an indigent requests expert assistance in a federal action. 18 U.S.C. § 3006A(e) (1993).

We perceive no reason to depart from our previous holding that there is no constitutional right to such a hearing. *O'Dell*, 234 Va. at 686, 364 S.E.2d at 499. Hence, we find no merit in this assignment.

THE ROBBERY CHARGE

[7] Before the venire entered the courtroom on the first day of trial, Ramdass pled guilty to the robbery of Kayani, offered to make a proffer of the evidence of his guilt and to waive his right to a presentence report, and moved the court to find him guilty and immediately sentence him. The Commonwealth's Attorney objected, contending that an immediate adjudication of guilt might raise an issue of Ramdass's right to assert a double jeopardy defense to the remaining charges. The court denied Ramdass's motion, deferred its adjudication of guilt and sentencing, and proceeded with the trial of the remaining charges.

After the Commonwealth rested its case in chief in the guilt phase of the trial, the court denied Ramdass's renewed motion for an adjudication of guilt on the robbery charge. When the jury returned a guilty verdict on the capital murder and weapon charges, the court found Ramdass guilty of all three charges. Ramdass again waived his right to a presentence report and moved the court to sentence him immediately. The court denied that motion. Instead, it referred the matter to a probation officer for a presentence investigation and report pursuant to the provisions of Code § 19.2-299.

According to Ramdass, the court violated his Fifth and Fourteenth Amendment rights in denying these motions. Had there been an immediate adjudication of his guilt in Kayani's robbery during the sentencing phase, Ramdass claims that he could have estab-

5. On brief, Ramdass contends that the court erred in failing to appoint "other expert witnesses," but the transcript does not reveal that he asked for any experts other than a doctor and a private investigator. Accordingly, we do not consider this contention. Rule 5:25.

lished his ineligibility for parole because of his three separate convictions of armed robbery. Code § 53.1-151(B1).[6] However, we need not decide whether the court abused its discretion in deferring Ramdass's conviction, because the court *had* found Ramdass guilty of the robbery before the sentencing phase.

Evidence of Ramdass's parole ineligibility was inadmissible in any event. We repeatedly have held that such evidence of parole ineligibility is inadmissible in capital murder cases. *Wright v. Commonwealth*, 245 Va. 177, 197, 427 S.E.2d 379, 392 (1993). We perceive no reason to modify our views on this issue and, therefore, we find no violation of Ramdass's constitutional rights in delaying his adjudication of guilt.

GUILT PHASE

Limitation of Cross-Examination

[8] Ramdass contends that the court erroneously restricted his right of cross-examination in refusing to permit impeachment of Singh and Ramirez by questioning their involvement in several unadjudicated crimes. It is well settled in Virginia that a litigant's right to impeach the credibility of adverse witnesses by showing their participation in criminal conduct has been confined to questions about a conviction for a felony, perjury, and a misdemeanor involving moral turpitude. Code § 19.2-269 (felony and perjury; first enacted in 1919, Code § 4779 (1919)); *Clark v. Commonwealth*, 202 Va. 787, 790, 120 S.E.2d 270, 272 (1961) (misdemeanor involving moral turpitude). This limitation upon a defendant's impeachment rights is a reasonably necessary measure to restrict the scope of a criminal trial. As we pointed out in *Clark*, admission of unadjudicated crimes for purposes of general impeachment of a witness would "lead to confusion in directing the jury's attention to collateral matters and away from the issues of the case." *Id.* at 790, 120 S.E.2d at 273.

Nevertheless, Ramdass claims that the trial court's adherence to this settled practice violated his confrontation rights under the Sixth Amendment of the United States Constitution and Article I, § 8 of the Virginia Constitution. He cites no authority to support such an expansive application of these rights, and we have found none. *Cf. Brown v. Commonwealth*, 246 Va. ——, ——, 437 S.E.2d 563, 564-65 (1993) (this day decided). Accordingly, we conclude that the trial court did not err in this limitation of Ramdass's cross-examination.

Next, Ramdass maintains that the trial court erred in refusing to permit him to ask Ramirez: "Did it surprise you that there were no fingerprints found [in the back room where Ramirez said he was when Ramdass shot Kayani]?" We find no abuse of the court's discretion in excluding such evidence; whether Ramirez was surprised would not be probative.

Instructions

[9] Ramdass contends that the trial court erroneously included the emphasized language in a part of the burden of proof instruction: "*The jury must limit its consideration to the evidence introduced*, and you are not to go outside the evidence to hunt up doubts, nor must you entertain doubts which are speculative or conjectural." According to Ramdass, this emphasized language specifically precluded the jurors from using their common sense in deciding whether the Commonwealth had carried its burden of proof. We do not agree.

The language complained of must be read in the context of the sentence and of the instruction relating to the jury's duty to weigh the evidence. Among other things, that instruction specifically told the jurors that "you are entitled to use your common sense in judging any testimony." Reading the instructions as a whole, we conclude that the language complained of neither expressly nor impliedly precluded the jurors from using their common sense in deciding whether the Commonwealth had proved its cases.

[10] Next, Ramdass argues that the court erred in refusing his proposed finding Instruction A. Ramdass's proposed instruction included first degree murder as a lesser-included offense of the capital murder charge should the Commonwealth fail to prove that the killing was "willful, deliberate and premeditated." We find no merit in this argument.

We do not agree with Ramdass's conclusory statements that his proposed instruction provided a "clearer and more precise connection between the two crimes, which actually allows the jury to weigh the offenses against each other in a more balanced and coherent manner, and a more accurate statement of the law." The court granted separate finding instructions in essentially the same language as Ramdass's proposed instruction. One instruction dealt with capital murder and the other dealt with first degree murder. Since Ramdass's tendered instruction essentially duplicated those instructions, the court did not abuse its discretion in refusing to grant a duplicative instruction. *Eaton v. Commonwealth*, 240 Va. 236, 255, 397 S.E.2d 385, 396 (1990), *cert. denied*, 502 U.S. ——, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991).

Next, Ramdass complains that the court erred in failing to grant his tendered Instruction H that read:

> If a witness makes inconsistent statements at different stages of his testimony in regard to the subject matter under investigation, this does not render his testimony nugatory, and it is the province of the jury to pass upon such inconsistent statements and to give or withhold its assent to the truth of the particular statement.

Instead, the court granted the Commonwealth's Instruction I that read:

> If a witness makes a statement at this trial inconsistent, contradictory, conflicting or materially different from that made on other occasions, it does not render his testimony nugatory, but it is the duty of the jury to determine the truth or falsity of the statements made in this trial and not elsewhere.

We find no abuse of discretion in the trial court's refusal to grant the tendered instruction, which essentially duplicated the language of granted Instruction I.

SENTENCING PHASE

[11] Ramdass argues that the court erred in refusing to respond to the jury's question, "[i]f the defendant is given life, is there possibility of parole at some time before his natural death?" Ramdass maintains that his parole ineligibility should have been disclosed to the jury in answer to this question. Such a response, he contends, would have aided the jury in choosing the appropriate sentence.

We repeatedly have held that a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence. *Wright*, 245 Va. at 197, 427 S.E.2d at 392. Ramdass advances no persuasive reason, and we perceive none, to modify our previous rulings. Accordingly, we conclude that the court correctly refused to advise the jury about Ramdass's ineligibility for parole. We also conclude that the court, using the language suggested in *Hinton v. Commonwealth*, 219 Va. 492, 495, 247 S.E.2d 704, 706 (1978), as an appropriate response to such a question, correctly told the jury that "you should impose such sentence as you feel is just under the evidence and within the instructions of the court. You are not to concern yourselves with what may happen afterwards."

SENTENCE REVIEW

[12] As required by Code § 17-110.1(C), we review the record to determine whether Ramdass's death sentence (1) was imposed under the influence of passion, prejudice, or any other arbitrary factor, or (2) is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Although Ramdass does not contend that the death sentence was imposed in violation of either of these factors, we have examined the records in all capital murder cases accumulated by this Court pursuant to Code § 17-110.1(E), paying particular attention to those cases in which the underlying felony was robbery and the death penalty was based solely on "future dangerousness."

6. As pertinent, Code § 53.1-151(B1) provides that: "Any person convicted of three separate felony offenses of ... robbery by the presenting of firearms or other deadly weapon ... shall not be eligible for parole."

These cases are compiled in *Yeatts v. Commonwealth*, 242 Va. 121, 143, 410 S.E.2d 254, 267–68 (1991), *cert. denied*, — U.S. —, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992).

Our review of those records, as well as the records of cases in which life imprisonment was imposed in similar cases, leads us to the conclusion that Ramdass's death sentence was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of a similar nature. The record in this case shows that Ramdass, who was born on October 19, 1971, has been involved in criminal activity since he was 14 years old.

His first violent offense was that of "purse snatch[ing]" from an elderly woman in 1985. During the time Ramdass was on probation for that offense, he began to sell illegal drugs. Soon after, he was involved in the unauthorized use of a moped and in the statutory burglary of a dwelling with the intent to commit larceny. As a result, Ramdass was committed to state juvenile facilities in January of 1986 and was paroled in September of that year. Within three months of that release, Ramdass had violated his parole and was recommitted. He remained in custody until November of 1987, when he was released for a 30-day home visit. Ramdass was classified as an escapee when he failed to return to the state juvenile facility at the end of his home visit.

On February 20, 1988, Ramdass robbed Frederick Thompson. When the police arrested Ramdass for that offense, he was sleeping with a loaded revolver on his bedside table. Ramdass, treated as an adult for that offense, pled guilty and was sentenced to a term of seven years in the penitentiary. Ramdass was released on mandatory parole in May of 1992.

Within three months of that release, while still on parole, Ramdass again acquired a gun. Shortly thereafter, he committed six armed robberies, some accompanied by physical violence to the victims.

The first two robberies occurred on August 25, 1992, when Ramdass abducted Robina Khan, robbed Malik Hasfiz, and robbed and struck Richard Imlow in a Pizza Hut in Fairfax County. Ramdass's third robbery was that of Christopher Allen Crissel, a clerk at Bragg Towers, an apartment-hotel in Alexandria, on August 29. Crissel testified that Ramdass struck Crissel in the jaw "as hard as he could, with a lot of impact [and] said 'Give me the f——— money or I'll blow your head off.'" After Crissel gave Ramdass over $500 from a desk drawer, Ramdass hit the back of Crissel's head with his gun "as hard as he could."

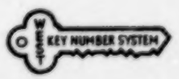
Ramdass committed his fourth and fifth robberies on the same day. On August 30 at about 6:00 p.m., Ramdass robbed Emmanuel Gilbert Selassie and shot him in the head at close range. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Then, on September 2, in the present case, Ramdass robbed Kayani in Ramdass's sixth robbery in eight days; he also shot Kayani in the head at close range and caused his death.

Finally, our review of the record discloses nothing to suggest that Ramdass's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

CONCLUSION

We find no error in these cases. In addition, we find no basis in the record to commute the death sentence to imprisonment for life. Accordingly, we will affirm the trial court's judgment.

Affirmed.



Ronald Anthony PEGUESE

v.

COMMONWEALTH of Virginia.

Record No. 0934-92-2.

Court of Appeals of Virginia.

Nov. 23, 1993.

Defendant was convicted in the Circuit Court of the City of Richmond, James B.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 17, 1999

No. 98-30
CA-96-831-2

BOBBY LEE RAMDASS

Petitioner - Appellee

v.

RONALD J. ANGELONE, Director, Virginia Department of Corrections

Respondent - Appellant

No. 98-32
CA-96-831-2

BOBBY LEE RAMDASS

Petitioner - Appellant

v.

RONALD J. ANGELONE, Director, Virginia Department of Corrections

Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

Appellee/cross-appellant filed a petition for rehearing and rehearing en banc and appellant/cross-appellee filed a response in opposition to the petition.

Judge Murnaghan voted to grant panel rehearing. Judges Widener and Niemeyer voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judges Murnaghan, Ervin, Michael and Motz voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Traxler and King voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor

CLERK

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VA R S CT Rule 3A:15
Sup.Ct.Rules, Rule 3A:15

VIRGINIA RULES OF COURT
RULES OF THE SUPREME COURT OF VIRGINIA
PART THREE A. CRIMINAL PRACTICE AND PROCEDURE

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Current with amendments received through 9-1-1999.

RULE 3A:15. MOTION TO STRIKE OR TO SET ASIDE VERDICT; JUDGMENT OF ACQUITTAL OR NEW TRIAL

(a) Motion to Strike Evidence. After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. If the court overrules a motion to strike the evidence and there is a hung jury, the accused may renew the motion within the time specified in Rule 1:11 and the court may take the action authorized by the Rule.

(b) Motion to Set Aside Verdict. If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.

(c) Judgment of Acquittal or New Trial. The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.

Source: Former Rule 3A:22.

Sup. Ct. Rules, Rule 3A:15
VA R S CT Rule 3A:15

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VA ST s 53.1-151
Code 1950, s 53.1-151

TEXT

CODE OF VIRGINIA
TITLE 53.1. PRISONS AND OTHER METHODS OF CORRECTION.
CHAPTER 4. PROBATION AND PAROLE.
ARTICLE 3. PROCEDURES GOVERNING PAROLE.

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Current through End of 1999 Regular Session.

s 53.1-151 Eligibility for parole.

A. Except as herein otherwise provided, every person convicted of a felony and sentenced and committed by a court under the laws of this Commonwealth to the Department of Corrections, whether or not such person is physically received at a Department of Corrections facility, or as provided for in s 19.2-308.1:

1. For the first time, shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years;

2. For the second time, shall be eligible for parole after serving one-third of the term of imprisonment imposed, or after serving thirteen years of the term of imprisonment imposed if one-third of the term of imprisonment imposed is more than thirteen years;

3. For the third time, shall be eligible for parole after serving one-half of the term of imprisonment imposed, or after serving fourteen years of the term of imprisonment imposed if one-half of the term of imprisonment imposed is more than fourteen years;

4. For the fourth or subsequent time, shall be eligible for parole after serving three-fourths of the term of imprisonment imposed, or after serving fifteen years of the term of imprisonment imposed if three-fourths of the term of imprisonment imposed is more than fifteen years.

For the purposes of subdivisions 2, 3 and 4 of subsection A and for the purposes of subsections B1 and B2, prior commitments shall include commitments to any correctional facility under the laws of any state, the District of Columbia, the United States or its territories for murder, rape, robbery, forcible sodomy, animate or inanimate object sexual penetration, aggravated sexual battery, abduction, kidnapping, burglary, felonious assault or wounding, or manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance, if such would be a felony if committed in the Commonwealth. Only prior commitments interrupted by a person's being at liberty, or resulting from the commission of a felony while in a correctional facility of the Commonwealth, of any other state or of the United States, shall be included in determining the number of times such person has been convicted, sentenced and committed for the purposes of subdivisions 2, 3 and 4 of subsection A. "At liberty" as used herein shall include not only freedom without any legal restraints, but shall also include release pending trial, sentencing or appeal, or release on probation or parole or escape. In

the case of terms of imprisonment to be served consecutively, the total time imposed shall constitute the term of the imprisonment; in the case of terms of imprisonment to be served concurrently, the longest term imposed shall be the term of imprisonment. In any case in which a parolee commits an offense while on parole, only the sentence imposed for such offense and not the sentence or sentences or any part thereof from which he was paroled shall constitute the term of imprisonment.

The Department of Corrections shall make all reasonable efforts to determine prior convictions and commitments of each inmate for the enumerated offenses.

B. Persons sentenced to die shall not be eligible for parole. Any person sentenced to life imprisonment who escapes from a correctional facility or from any person in charge of his custody shall not be eligible for parole.

B1. Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole. In the event of a determination by the Department of Corrections that an individual is not eligible for parole under this subsection, the Parole Board may in its discretion, review that determination, and make a determination for parole eligibility pursuant to regulations promulgated by it for that purpose. Any determination of the Parole Board of parole eligibility thereby shall supersede any prior determination of parole ineligibility by the Department of Corrections under this subsection.

B2. Any person convicted of three separate felony offenses of manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance, when such offenses were not part of a common act, transaction or scheme, and who has been at liberty as defined in this section between each conviction, shall not be eligible for parole.

C. Any person sentenced to life imprisonment for the first time shall be eligible for parole after serving fifteen years, except that if such sentence was for a Class 1 felony violation or the first degree murder of a child under the age of eight in violation of s 18.2-32, he shall be eligible for parole after serving twenty-five years, unless he is ineligible for parole pursuant to subsection B1 or B2.

D. A person who has been sentenced to two or more life sentences, except a person to whom the provisions of subsection B1, B2, or E of this section are applicable, shall be eligible for parole after serving twenty years of imprisonment, except that if either such sentence, or both, was or were for a Class 1 felony violation, and he is not otherwise ineligible for parole pursuant to subsection B1, B2, or E of this section, he shall be eligible for parole only after serving thirty years.

E. A person convicted of an offense and sentenced to life imprisonment after being paroled from a previous life sentence shall not be eligible for parole.

E1. Any person who has been convicted of murder in the first degree, rape in violation of s 18.2-61, forcible sodomy, animate or inanimate object sexual penetration or aggravated sexual battery and who has been sentenced to a term of years shall, upon a first commitment to the Department of Corrections, be eligible for parole after serving two-thirds of the term of imprisonment imposed or after serving fourteen years of the term of imprisonment imposed if two-thirds of the term of imprisonment imposed is more than fourteen years. If such person has been previously committed to the Department of Corrections, such person shall be eligible for

parole after serving three-fourths of the term of imprisonment imposed or after serving fifteen years of the terms of imprisonment imposed if three-fourths of the term of imprisonment imposed is more than fifteen years.

F. If the sentence of a person convicted of a felony and sentenced to the Department is partially suspended, he shall be eligible for parole based on the portion of such sentence execution which was not suspended.

G. The eligibility time for parole as specified in subsections A, C and D of this section may be modified as provided in ss 53.1-191, 53.1-197 and 53.1-198.

H. The time for eligibility for parole as specified in subsection D of this section shall apply only to those criminal acts committed on or after July 1, 1976.

I. The provisions of subdivisions 2, 3 and 4 of subsection A shall apply only to persons committed to the Department of Corrections on or after July 1, 1979, but such persons' convictions and commitments shall include all felony convictions and commitments without regard to the date of such convictions and commitments.

CREDIT

(Code 1950, ss 53-251, 53-272; 1954, c. 141; 1956, c. 342; 1958, cc. 249, 468; 1962, c. 327; 1970, c. 648; 1975, c. 244; 1976, cc. 145, 209, 425; 1977, cc. 344, 546, 570; 1979, c. 411; 1981, c. 392; 1982, cc. 270, 636; 1985, c. 555; 1987, c. 668; 1988, c. 872; 1990, cc. 220, 684; 1991, c. 423; 1993, cc. 485, 491, 907.)

Code 1950, s 53.1-151
VA ST s 53.1-151

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SC ST § 16-3-20
Code 1976 § 16-3-20

CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 16. CRIMES AND OFFENSES
CHAPTER 3. OFFENSES AGAINST THE PERSON
ARTICLE 1. HOMICIDE

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Current through End of 1998 Reg. Sess.

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty- four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence

secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;
(b) kidnapping;
(c) burglary in any degree;
(d) robbery while armed with a deadly weapon;
(e) larceny with use of a deadly weapon;
(f) killing by poison;
(g) drug trafficking as defined in Section 44-53-370(e), 44-53- 375(B), 44-53-440, or 44-53-445;
(h) physical torture; or
(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

HISTORY: 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 § 1; 1978 Act No. 555 § 1.

HISTORY: 1985 Act No. 104, § 1, eff May 21, 1985; 1986 Act No. 462, § 27, eff June 3, 1986; 1990 Act No. 604, § 15, eff June 25, 1990; 1992 Act No. 488, § 1, eff July 1, 1992; 1995 Act No. 83, § 10, eff January 1, 1996; 1996 Act No. 317, § 1, eff May 20, 1996.

EDITOR'S NOTE--

1990 Act No. 604, § 17, eff June 25, 1990, provides as follows:

"This act takes effect upon approval by the Governor. A person arrested, charged, or indicted under those provisions of law amended by this act must be tried and sentenced and any administrative penalty or suspension exacted as provided by the law in force at the time of the commission of the crime."

EFFECT OF AMENDMENT--

The **1985** amendment rewrote subsection (A) to provide that when a sentence of death is commuted, the commutee is not eligible for parole.

The **1986** amendment made grammatical changes; revised subsection (A) by adding the provision relative to the sentence to be imposed when an aggravating circumstance is found beyond a reasonable doubt but a recommendation of death is not made, and by substituting "mandatory imprisonment" for "mandatory twenty years' imprisonment" in the last sentence; revised subsection (B) by substituting "trial by jury" for "the trial jury", and by substituting "the sentence to be imposed" for "the sentence of death" and for "the sentence imposed"; revised subsection (C) by rewriting subitem (a)(7), by adding subitems (a)(8) and (9), and by adding the provisions relative to juries which do not recommend death despite finding an aggravating circumstance beyond a reasonable doubt, questioning the jury, prior to its dismissal, as to whether it found an aggravating circumstance beyond a reasonable doubt, and designation of such a finding in a writing signed by all members of the jury; and revised subsection (E) by substituting "verdict according to law" for "verdict of guilty according to law".

The **1990** amendment revised subsection (C)(a).

The **1992** amendment, in subsection (C), item (b), added subitem (10).

The **1995** amendment substantially revised this section.

The **1996** amendment in subsection (C), item (a), added subitem (11).

Code 1976 § 16-3-20

SC ST § 16-3-20

END OF DOCUMENT